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INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987

DECEMBER 22 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1703]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1703) a bill to amend the Indian Self-Determination and Education Assistance Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The Indian Self-Determination and Education Assistance Act was signed into law by President Ford on January 4, 1975.[1] The Indian Self-Determination Act authorizes tribes to contract with the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services to administer previously authorized programs otherwise administered directly by those Departments. The Act was intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities.

S. 1703, the Indian Self-Determination Act Amendments of 1987, represents a comprehensive reexamination by Congress and Indian

[1] Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203 as amended. See also Public Law 98-250, Act of April 3, 1984, 98 Stat. 118.

tribes of the Indian Self-Determination and Education Assistance Act of 1975. The amendments contained in S. 1703 are intended to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs. The amendments are intended to remove many of the administrative and practical barriers that seem to persist under the Indian Self-Determination Act.

Background and Need

Federal policy and the trust relationship

The Federal Government has provided services to Indians for nearly two hundred years. The earliest federal services to Indians were based on treaties and were intended as compensation to Indians for land cessions and other benefits granted to the United States. In negotiating treaties with Indian tribes, the federal government generally offered some type of quid pro quo for land and other tribal concessions. In addition, early federal services to Indians were authorized by statute. For example, the Snyder Act of 1921 authorized the Bureau of Indian Affairs to administer programs "for the benefit, care, and assistance of the Indians throughout the United States.[2] The broad declaration of purposes contained in the Snyder Act provides congressional authorization for expenditures for many BIA activities, including health, education, employment, administration of Indian property, and irrigation.

Since the 1930's the reassertion of tribal self-government, coupled with a growing federal interest in decentralization, have resulted in an increase in services initiated or administered by Indian tribes. This development was stimulated by passage of the Indian Reorganization Act of 1934. The 1934 Act began a trend of transferring control of federal services to tribes reorganized under the Act.

The extent of tribal control over federal Indian programs was modest until the 1970's. Passage of the Indian Self Determination and Education Assistance Act of 1975 and such measures as the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing) and the Comprehensive Employment and Training Act of 1973 revived and expanded upon many policies first enunciated in the Indian Reorganization Act. Today, many tribes are undertaking their own education, health, and job-training programs, making use of their own revenues as well as grants from relevant federal agencies. These activities have enhanced the development and perception of Indian tribes as self-governing entities.

The federal policy of Indian self-determination is one of the most progressive federal Indian polices in our Nation's history. The self-determination policy is premised on the notion that Indian tribes are the basic governmental units of Indian policy. The self-determination policy was first formally enunciated in 1970 by President Richard M. Nixon. In his Special Message to the Congress on Indian Affairs, President Nixon explained that

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[2] Ch 115, 42 Stat. 208 (Codified as amended at 215 U.S.C. 13).

> For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the treat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.
>
> This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a Federal agency.[3]

In fact, the Indian Self-Determination Act has been the major reason for assumption by Indian tribes of responsibility for Federal Indian programs. The Act directs the Secretary of Interior and the Secretary of Health, Education and Welfare, to enter into a contract with Indian organizations at the request of Indian tribes. Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by either Secretary. If a contract application is declined, the burden of proof is on the Secretary to show that the statutory grounds for declination exist.

The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. The present right of Indian tribes to govern their members and territories flows from a preexisting sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States. Tribal powers of self-government today are recognized by the Constitution, Acts of Congress, treaties between the United States and Indian tribes, judicial decisions, and administrative practice.

The right of tribal self-government is further protected by the trust relationship between the Federal Government and Indian tribes. The concept of a federal trust responsibility to Indian people was fashioned gradually by the Federal courts. The concept first appeared in Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia*.[4] During the twentieth century the trust principles articulated in *Cherokee Nation* v. *Georgia* have been applied in many specific situations to establish and protect rights of Indian tribes and individuals. Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. Even more broadly, federal action toward Indians as expressed in treaties, agreements statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.

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[3] "Special Message to the Congress on Indian Affairs", [1970] Pub. Papers 564, 567 (President Richard M. Nixon).

[4] 30 U.S. (5 Pet.) 1 (1831).

Self-Determination and Tribal Economic Development

Indian tribal governments have developed rapidly since passage of the Indian Self-Determination Act. In addition to operating health services, human services, and basic governmental services such as law enforcement, water systems and community fire protection, tribes have developed the expertise to manage natural resources and to engage in sophisticated economic and community development. All of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel and physical resources. Most Indian communities share with rural non-Indian communities problems of inadequate infrastructure and lack of access to managerial talent. Nevertheless, compared to state, county and municipal governments of similar demographic and geographic characteristics, the level of development attained by tribal governments over the past twelve years is remarkable. This progress is directly attributable to the success of the federal policy of Indian self-determination.

Improvements in tribal financial, personnel, property, and procurement systems have enabled tribes to manage increasingly complex matters. In response to both federal and tribal demands for accountability, most Indian tribes that operate programs now have annual single-agency audits of tribal finances. The Department of Interior Office of Inspector General has reported an increase in tribal assumption of responsibility for tribal financial management. These improvements have been financed by a combination of tribal funds, indirect cost reimbursements associated with self-determination contracts, Bureau of Indian Affairs self-determination grants, and Indian Health Service tribal management grants.

The conditions for successful economic development on Indian lands are essentially the same as for any other predominantly rural community. There must be community stability, including adequate law enforcement and judicial systems and basic human services. There must be adequate infrastructure including roads, safe water and waste disposal systems, and power and communications utilities. When these systems and services are in place, tribes are in the best position to implement economic development plans, taking into account the available natural resources, labor force, financial resources and markets.

Tribal control of economic development programs is essential to the success of business enterprises, regardless of whether they are tribal, private or joint venture activities. In many cases of successful Indian economic development, a general pattern is apparent. Indian tribes use self-determination contracts to meet basic human needs in Indian communities. The tribes then use tribal, federal and private resources to create jobs and support businesses on Indian lands.

With self-determination contracts to support local government services on Indian lands, tribes are in a better position to utilize tribal financial resources, including interest earned on tribal trust funds, as contributions toward maximizing the financing of economic enterprises. Tribal self-determination contracts to conduct comprehensive planning, land use studies, and natural resource in-

ventories have been essential to the success of Indian economic development efforts. The obvious conclusion is the same for Indian and non-Indian rural communities: the development of local government services, the provision of supportive human services, and local planning are essential to successful economic development. The Indian Self-Determination Act has made these conditions possible on many Indian reservations.

Improving the Management and Delivery of Tribal Services

A fundamental objective of the federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members. Consequently, the Indian Self-Determination Act provides tribes with the flexibility to redesign Federal programs and services to meet the needs of Indian people. For example, according to the Bureau of Indian Affairs Manual, the primary purposes of the BIA social services program are to provide general assistance payments, to place Indian children in residential placements and to place elderly Indian people in custodial care placements. When tribes have assumed control of social service programs, however, they almost invariably have reversed these priorities and have emphasized providing supportive casework services to keep Indian families intact and to enable elderly Indian people to continue living independently in their homes.

One of the most important developments in Indian health care has been the role of Indian community health workers in providing outreach services to isolated Indian families. Outreach services have helped to overcome cultural barriers between traditional Indian people and modern health delivery systems. As a result, over the past decade, there has been a tremendous increase in the utilization of health facilities by Indian people. Morover, there have been major increases in the utilization of health facilities for preventive services, as opposed to the use of such facilities for acute and emergency care only.

With funds authorized by the Indian Sanitation Facilities Act of 1959,[5] self-determination contracts have enabled tribes to build safe water and sanitary waste disposal systems and generally to improve health conditions on Indian lands. Many Indian tribes now control the safety and quality of drinking water for Indian communities. These tribally-controlled water and waste systems have contributed directly to a decrease in the incidence of communicable diseases and in some of the major causes of infant mortality.

An essential factor in the success of the policy of Indian self-determination is that it allows tribes to plan and deliver services appropriate to their diverse demographic, geographic, economic and institutional needs. According to the 1980 census, there are 278 Indian reservations and 209 Alaska Native villages. They range in size from the Navajo Nation, which is the largest tribe in the United States with a population of 173,018 Indian reservation residents, to small rancherias in California with less than a few dozen residents.

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[5] Public Law 86–121.

Many tribes are situated on rural and isolated reservations. Other tribes have lands that are adjacent to major metropolitan areas. The Puyallup Tribe, for example, resides on a reservation that is entirely within the boundaries of the City of Tacoma, the second largest city in Washington state. In stark contrast to the Puyallup Tribe, the Havasupai Tribe resides in a portion of the Grand Canyon accessible only by foot, by horse or by helicopter.

Given the diversity of tribal conditions, broad new federal policies rarely meet the needs of all tribes. The Indian Self-Determination Act provides tribes with the opportunity to design and implement policies appropriate to their local needs.

Implementation of the Policy of Indian Self-Determination

The Indian Self-Determination Act uniquely requires the Secretary of the Interior and the Secretary of Health and Human Services to continue providing direct services until such time as a tribe freely chooses to contract to operate those services. At that point, the Secretaries are required to transfer resources and control over those programs to the tribe. There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources. The Committee recognizes that the uniqueness of this Act has made its implementation a complex process for both the tribes and the Federal agencies.

The Federal agencies charged with implementing the Indian self-determination policy have made remarkable progress over the past decade. As of fiscal year 1985, the Bureau of Indian Affairs has entered into 1,421 self-determination contracts with tribal organizations. The funding for these contracts has totaled $234,790,000 in direct funds and $37,749,000 in indirect funds. The total sum of $272,539,000 contracted to tribes represents 25 percent of the entire budget of the Bureau of Indian Affairs. This represents a substantial transfer of federal program responsibilities and resources to Indian tribes which have strengthened tribal governmental capabilities.

In Fiscal Year 1987, the Indian Health Service directly operated 45 hospitals, 71 health centers and several hundred smaller health stations and satellite clinics.[6] At the same time, tribal organizations operated 6 hospitals and approximately 300 outpatient health clinics.[7] In addition, with funds provided by the Indian Health Service, Indian tribes provide community health outreach and public health nursing services, and alcohol and drug counseling and treatment.

Generally, Indian self-determination has been a successful federal policy. There have been problems, however, associated with its implementation. When the Indian Self-Determination Act was passed, both the Congress and the Executive branch envisioned a clear-cut transfer of federal responsibilities as well as federal financial, administrative, technical and other resources to the tribes. This transfer has been complicated by subsequent laws and federal

[6] Fiscal Year 1988 Budget Request, Indian Health Service.
[7] Id.

policies which have interfered with the contractual relationship contemplated by the Act between the Federal Government and tribal governments. Attempts to transfer federal funds to tribes have been further complicated by the difficult federal budget pressures of the past decade. As a result, federal agencies and tribes have been competing for the same federal funds to carry out their respective responsibilities.

On April 22, 1987, in response to numerous complaints from Indian tribes about problems associated with implementation of the Indian Self-Determination Act and suggestions by tribes for its improvement, the Committee conducted an oversight hearing on the Act. At that hearing, tribal witnesses described the policy of Indian Self-Determination as a positive and constructive federal policy. The tribal witnesses testified that the transfer of program control and resources to the tribes made possible by this law has resulted in greater utilization of health facilities by Indian people, in better educational achievement by Indian children in Indian-controlled schools, in stronger Indian families because of tribal emphasis on child welfare services, and in more effective law enforcement by tribal officers. Increased stability in Indian communities as a result of programs operated by tribal governments has, in turn, enabled tribal leaders to focus their efforts on economic development.

The tribal witnesses explained, however, that while there has been great progress, there have also been obstacles to Indian self-determination. Inappropriate application of federal procurement laws and federal acquisition regulations to self-determination contracts has resulted in excessive paperwork and unduly burdensome reporting requirements. Furthermore, witnesses explained that the failure of Federal agencies to reimburse tribes for the cost of program operation has resulted in a tremendous drain on tribal financial resources.

The federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy. Many tribes have found themselves reporting to Contracting Officer's Representatives (CORs) and Subordinate Contracting Officer's Representatives ("Sub-CORs") at the local agencies of the Bureau of Indian Affairs. These federal monitoring personnel impose additional reporting requirements on tribal contractors which often are not required under applicable laws and regulations, thereby making the contracting process much more burdensome and time-consuming. For example, federal officials will require a tribe to submit a list of the serial numbers of all law enforcement vehicles operated by the tribe, as a condition of approving a law enforcement contract. Or, a Superintendent for Education will require tribes to submit certificates of Indian blood for Indian children served by tribal Johnson-O'Malley contracts, although the BIA does not require the same information from public schools. Tribes are forced to fill out and submit lengthy computer data reports. The data from those reports are not provided to the tribes, and are frequently inaccurate. Consequently, the reports essentially are useless for tribal management purposes. Tribes that successfully deliver services and manage their resources are still required to submit lengthy quarterly reports and voluminous contract reapplications.

Tribes that intend to contract with the Bureau of Indian Affairs must submit their applications to the local BIA Agency Superintendent. A contract for law enforcement, for example, must be reviewed by the program staff associated with the law enforcement program. The Agency "638 (self-determination) specialist" then reviews the proposal package to determine whether or not the tribe has submitted all required certifications, resolutions and forms. The Superintendent then makes a recommendation, but not a decision, on the contract application and forwards the package to the Area Office.

At the Area Office, the contract application is again reviewd for identical purposes by the branch of law enforcement staff and by another self-determination specialist. In addition, the application is reviewed by the Area branch of property and supply to insure that the contract application adheres to all applicable federal acquisition regulations. These offices then make a recommendation to the Area Director.

Following these six layers of review, if the Area Director approves the application, it is then returned to the branch of property and supply. Area Director approval of an application and a contract funding award by the contract officer are separate matters. If the contract funding is awarded by the Contracting Officer, the complete package must then be sent to the Finance Office to have the tribe's award placed on a letter of credit so that the tribe can begin to obligate and draw down funds. The existing law provides sixty days for contract approval by the Secretary. In practice, however, the approval and award process often takes up to six months and sometimes longer.

Fluctuations in annual funding levels for self-determination contracts attributable to budgetary allocations to cover federal pay costs, retirement costs and other federal needs inject uncertainty into the planning and management of tribal programs. Funds allocated for tribal contracts often are reallocated by the Bureau of Indian Affairs to pay for such items as federal computer equipment acquisition and software development costs. The Fiscal Year 1988 Budget Request for the Indian Health Service contained a proposal to fund federal pay and retirement costs partly out of funds appropriated for tribal health programs. In the Bureau of Indian Affairs' Phoenix Area, for example, tribal contract funds have been routinely reduced, in violation of Section 106(h) of the current law, to pay for federal contract monitoring costs.

Indirect Costs

Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal

funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

The Federal agencies have imposed requirements for accountability on tribes that are more stringent than the requirements that are imposed on the Federal agencies themselves. The Self-Determination Act requires the Federal agencies to make available the same amount of funding to operate a program under contract as would have been available if the Federal Government were operating the program. In practice, however, the Federal agencies provide less funding to Indian tribes to operate programs than is provided to the Federal agencies. Tribal governments are required to pay for independent financial audits, which are often expensive. The Federal Government does not incur this audit cost in its operation of a program. Further, tribal governments must carry liability insurance, premiums for which have skyrocketed in the last few years, just as they have for other units of government. The Federal Government, because it is covered under the provisions of the Federal Tort Claims Act, does not have to incur the cost of purchasing such insurance. The Federal Government requires Indian tribes to submit quarterly and annual program and financial reports. These administrative demands require sophisticated and costly management systems.

Tribal governments, like state and local governments, use indirect costs to pay for these administrative costs. The indirect cost method is a widely accepted management tool for allocating costs common to many different programs and functions within a government entity. The Office of Management and Budget has established guidelines for federal agencies to use to determine indirect cost rates.[8] Tribal indirect cost rates are negotiated and approved according to OMB guidelines by the Department of Interior Office of Inspector General.

For several years the Bureau of Indian Affairs and the Indian Health Service have failed to request from the Congress the full amount of funds needed to fully fund indirect costs associated with self-determination contracts. Consequently, tribes have been forced to request supplemental appropriations directly from Congress to make up the shortfall. The Senate Committee on Appropriations questioned the chronic shortfalls of contract support costs in its report on the Fiscal Year 1984 Appropriations Act for the Department of the Interior and Related Agencies. The Senate Committee Report stated that

> Contract Support Costs have increased far out of proportion with the rather small increases in total dollar volume of contracts. While the Inspector General is charged with

[8] Office of Managment and Budget Circular A-87, "Cost Principles for State and Local Governments".

> the responsibility for determining "allowable costs" neither the IG nor the BIA make any effort to determine the reasonableness of such costs. The Committee believes that this should be the responsibility of the Bureau. Various options for controlling indirect costs are currently under consideration and the Committee expects a report with recommendations to be included in the submission of the fiscal year 1985 budget which will alter the budget format as indirect costs are to be included in the program accounts rather than as a line item.[9]

The Select Committee on Indian Affairs does not agree with the analysis of this issue presented by the Senate Appropriations Committee. Part of the problem with this view of indirect cost was that the term "contract support costs" had not been operationally defined. The term has variously meant administrative overhead costs, indirect costs and the incremental costs associated with the management of a new contract. Another aspect of the problem is that the Bureau of Indian Affairs has failed to accurately represent the facts regarding indirect costs, including failing to acknowledge an important study conducted in 1983 by the Department of Interior Office of Inspector General.

In its Fiscal Year 1985 Budget Request, the Bureau of Indian Affairs responded to the Senate Committee on Appropriations by allocating "contract support funds" to the various funding activities (combining support costs with direct program dollars), and maintaining the program element "contract support funds" for new contracts only. Previously, the Bureau had contracted with the American Indian Law Center to conduct an analysis of Bureau of Indian Affairs Public Law 93-638 indirect cost and contract support policy, procedures and practice.[10] The American Indian Law Center conducted a review of written document and interviews with officials of the Bureau of Indian Affairs and other federal agencies. The American Indian Law Center concluded that

> [the decision to fund] tribal indirect costs associated with Public Law 93-638 contracts * * * through a separate Contract Support fund * * * did not, as intended, merely provide for the additional funds required for a tribe to manage a new program * * * [it] also created an open-ended uncontrollable, entitlement fund, the size and distribution of which depended solely on the initiative and ingenuity of each tribe in expanding its administrative organization and shifting the maximum amount of expenses to the indirect, rather than direct, category.[11]

In the spring of 1987, the Senate Select Committee on Indian Affairs challenged the Bureau of Indian Affairs to produce evidence of improper tribal manipulation of indirect cost pools. The Bureau has been unable to substantiate these charges.

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[9] S. Rept. 98-184, 98th Congress, 1st Sess. 46 (1983).

[10] BIA Contract K51C14201178 (March 1982).

[11] Id., quoted in United States Department of the Interior, Budget Justifications, F.Y. 1985, Bureau of Indian Affairs BIA-105. Both the BIA and the American Indian Law Center recommended a flat rate, in lieu of indirect costs, which was calculated at 15 percent.

In 1983, the Department of Interior Office of Inspector General issued its own report on indirect costs.[12] In contrast to the American Indian Law Center study, the Office of Inspector General actually examined the indirect cost rates of eighty-one Indian tribes for a five-year period from 1979 through 1983. The Inspector General concluded that tribal indirect cost rates did, in fact, increase during the five-year period. Instead of attributing this increase to tribal "ingenuity", the Inspector General concluded that

> First, Indian tribes have been trying to improve their administration and comply with Federal requirements. This costs more money. Second, administrative costs tend to be more fixed than variable. Consequently, the two categories of cost will not change in the same proportions.[13]

The Inspector General further identified four significant components of the increase in tribal indirect cost pools. The report stated:

> 1. Salary costs increased by 81.5 percent over the 5-year period. This trend can be justified as part of the overall objective of improving administration. However, we believe there is an additional explanation for the continued increase in 1982 and 1983. This period coincides with reductions in the CETA program which paid for some administrative positions. Consequently, financing of these positions was shifted to the indirect cost pool.
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> 2. Tribal council costs show an 86.2 percent increase over the 5-year period. Our policy is to accept 50 percent of such costs as allocable to direct programs, i.e., allowable indirect cost items. A few tribes are able to justify a higher percentage by presenting documentation showing that more than 50 percent of the council's time is spent administering direct programs. The trend of increasing tribal council costs is easily explained. Historically, most tribal councils were paid only when they met or were unpaid. As Federal programs became available, more became available for administration and more money to pay for tribal council salaries. The current trend is to place tribal council members [officers] on a full time salary basis.
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> 3. Audit costs have gone up 230.5 percent over the 5-year period. The most dramatic increase was 1983 over 1982—up 102.2 percent. This is directly attributable to some tribes contracting with CPA firms to meet audit requirements of OMB Circular A-102, Attachment P. If this trend continues, we believe audit costs will increase by an additional 400 percent.
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> 4. EDP [Electronic Data Processing] costs increased by 225.7 percent over the 5-year period. This is reflective of the general pattern of increased use of the computer. However, we could not discern any evidence that increased use of the computer produced a reduction in any other cost element.[14]

The use of indirect costs is widely accepted by state, county and local governments, and by universities, hospitals and nonprofit or-

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[12] "Trend Analysis Using Data Available from the Indirect Cost Rate Negotiation Process With Indian Tribes," (Inspector General, July 15, 1983).

[13] Department of the Interior, Office of Inspector General (July 1983).

[14] "Trend Analysis Using Data Available From the Indirect Costs Rate Negotiation Process with Indian Tribes," Department of the Interior, Office of Inspector General, July 1983).

ganizations. The most relevant issue is the need to fully fund indirect costs associated with self-detemination contracts. The Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services should request the full amount of funds from the Congress that are adequate to fully fund tribal indirect costs. Furthermore, the Bureau of Indian Affairs and the Indian Health Service must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services.

The Committee's amendment to the Indian Self-Determination Act are designed to require the Bureau of Indian Affairs and the Indian Health Service to comply with the requirement of the Act that indirect costs be added to the amount of funds available for direct program costs. These amendments are supported by a recent report of the President's Council on Integrity and Efficiency. The President's Council recommended that indirect costs of tribes be fully funded. The Council recommended that

> the Assistant Secretary for Indian Affairs submit proposals to Congress and the Office of Management and Budget to change the method of reimbursing Indian organizations by (1) removing the legislative and administrative restrictions that affect the reimbursement of indirect costs of Indian organizations, (2) authorizing the Bureau of Indian Affairs to negotiate lump-sum agreements to directly fund all indirect costs relative to Federal contracts and grants, (3) budgeting and providing full funding to the Bureau of Indian Affairs for indirect cost lump-sum agreements, and (4) authorizing Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in subsequent years. We also recommend that the Assistant Secretary for Indian Affairs not proceed with the Bureau of Indian Affairs efforts to establish a flat-rate reimbursement procedure for indirect costs.[15]

Tribal witnesses at the Committee hearings on the Indian Self-Determination Act repeatedly described the overwhelming administrative problems caused by indirect cost shortfalls. Tribes are held liable by the Office of Inspector General to collect the full amount of their indirect costs, even if Federal agencies fail to reimburse tribes for those costs. Tribes then operate at a deficit and carry forward a "theoretical" overrecovery, which adversely affects ther rates in subsequent years. Some tribes have found themselves owing the Federal government several hundred thousand dollars because of "theoretical" overrecoveries which result from indirect cost shortfalls, which in turn result from the failure of Federal agencies to pay their full share of indirect costs.

Many tribes are forced to use tribal trust fund revenues to subsidize indirect costs. One tribe in Nevada was forced to budget over $90,000 to cover shortfalls in Federal indirect costs for just one year. Consequently, that tribe was unable to use its trust fund rev-

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[15] "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred," President's Council on Integrity and Efficiency (September 1987).

enues to leverage private funds for economic development. The failure of federal agencies to provide their share of indirect costs has even more devastating impacts on those tribes and tribal organizations that have no sources of independent income. Tribes and tribal organizations with no independent income are faced with the onerous choice of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems. The Committee is greatly concerned that tribes will choose a third alternative: to retrocede the contract back to the Federal agency.

The Federal Government would not consider it proper to shortchange funding for contracts with private suppliers of goods and services. When the Bureau of Indian affairs and the Indian Health Service contract with Indian tribes, however, they routinely fail to reimburse tribes for legitimate administrative costs associated with carrying out federal responsibilities. Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed.

According to a recent report prepared by the Affiliated Tribes of Northwest Indians,

> It really comes down to this important point: to implement true self-determination, Congress and the BIA/IHS must budget and appropriate adequate funds to contract for federal Indian programs and services. To provide less than adequate funds, in many cases, causes financial hardship and prolongs dependence on the Federal Government. In short, to allow the BIA and IHS to underfund the Public Law 93-638 contracts is to plot a sure path to programmatic failure.[16]

The Committee believe that these amendments are necessary in order to meet the challenge presented by the tribes: to fully support the successful implementation of the federal policy of Indian Self-Determination.

Legislative History

The Indian Self-Determination and Education Assistance Act was signed into law by President Ford on January 4, 1975. The act is intended to assure maximum participation by Indian tribes in the planning and administration of federal services, programs and activities for Indian communities. The Indian Self-Determination Act authorizes tribes to contract with the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services to administer previously authorized programs otherwise administered directly by those Departments.

The Indian Self-Determination Act was amended by Public Law 98-250, signed on April 3, 1984. The technical amendment provides that the Indian Self-Determination Act shall not be subject to the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (Public Law 95-224). The 1984 amendment allows tribes to

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[16] Determining the True Cost of Contracting Programs for Indian Tribes, Affiliated Tribes of Northwest Indians (May 1987).

use a grant or cooperative agreement instrument in lieu of a contract instrument when mutually agreed to by the tribe and the appropriate Secretary.

S. 1703 was introduced in the Senate on September 18, 1987 by Senator Evans, for himself, and Senators Inouye, McCain, Burdick, DeConcini, Murkowski, Daschle, Domenici, Hatfield, Packwood, Cochran, Hecht, Bingaman, Adams, Melcher, Gore, Pell and Chafee. S. 1703 was referred to the Select Committee on Indian Affairs. The Committee held a hearing on S. 1703 on October 2, 1987. On October 30, 1987, the Committee ordered reported an amendment in the nature of a substitute to S. 1703.

A companion bill, H.R. 1223, was introduced by Congressman Udall, for himself and Congressman Richardson on February 24, 1987 and was referred to the House Committee on Interior and Insular Affairs. H.R. 1223 was ordered reported by the Interior and Insular Affairs Committee on October 7, 1987. On October 27, 1987, H.R. 1223 was passed by the House of Representatives.

Tribal Participation in the Development of S. 1703

The Committee recognizes the importance to Indian tribes of the Indian Self-Determination Act and the complexity of the issues involved in amending the Act. Consequently, the Committee enlisted the assistance of Indian tribal leaders in developing the draft amendment. Committee staff met with an informal working group of tribal elected officials, finance managers, program managers and planners in Washington, D.C. for two days in March 1987 to discuss tribal concerns with implementation of the Indian Self-Determination Act. This tribal working group was instrumental in assisting the Committee to address many very difficult concerns.

The Committee held an oversight hearing on the Indian Self-Determination Act in Washington, D.C., on April 22, 1987. At that hearing, the Committee heard recommendations from tribal leaders and experts in tribal contracting, including the following:

Clarify that federal acquisition regulations (41 CFR) should not apply to self-determination contracts (25 CFR, and the Single Agency Audit Act would still apply to self-determination contracts).

Allow tribes that have successfully operated contracts for three or more years, and that have clean audits, to consolidate those contracts into one "mature" contract.

Reduce the reporting requirements for "mature" contracts and emphasize the role of the annual single agency audit in financial accountability.

Provide protection for tribal contract funding against federal encroachments for federal pay costs, retirement costs, computer equipment costs, contract monitoring costs and other federal administrative costs.

Provide a framework for enabling the Congress to determine the amount of appropriations needed for tribal indirect costs.

Insure that the Bureau of Indian Affairs and the Indian Health Service fully fund tribal indirect costs associated with self-determination contracts.

Provide remedies for indirect cost rate problems caused by the failure of Federal agencies other than the BIA or IHS to fully fund their share of indirect costs.

Provide Federal Tort Claims Act coverage for tribes carrying out self-determination contracts.

Provide for Federal district court jurisdiction in contract disputes, and provide that the Contract Disputes Act applies to self-determination contracts.

Shortly after the April 1987 hearing and based on the testimony presented there, the Committee developed a draft bill and sent the bill to all tribal government leaders in the United States for review and comment. The draft bill was also sent to the Assistant Secretary for Indian Affairs and to the Director of the Indian Health Service. After thorough discussion of the draft bill, Senator Evans, on behalf of himself, Committee Chairman Inouye, and several other senators introduced S. 1703 on September 18, 1987.

The Committee held a hearing on S. 1703 on September 21, 1987 in Tampa, Florida, in conjunction with the annual meeting of the National Congress of American Indians. The purpose of this hearing was to hear further recommendations regarding the proposed legislation. At the September 21 hearing, tribal witnesses reemphasized the need for full funding of indirect costs and protection of tribal contract funds from reallocation by Federal agencies to other programs. Witnesses also described the serious problem associated with the costs of medical malpractice premiums for tribal health contractors. In the Indian Health Service Juneau Area, for example, premiums for contractors have increased from $293,406 in 1984 to $1,314,465 in 1987, an increase of 448%. These costs must be taken out of funds that would otherwise be available for health care services. Thus, the necessity to obtain liability insurance has led to decreases in the level of health services that tribal contractors are able to provide to Indian people.

On October 2, 1987, the Committee held a hearing in Washington, D.C., to receive the views of the Administration on S. 1703. The testimony of the Assistant Secretary for Indian Affairs included detailed comments and recommendations for improvement upon certain provisions included in S. 1703. The Director of the Indian Health Service also testified at that hearing.

Based upon comments and recommendations received from the tribes and from the Administration, the Committee staff began to develop amendments to the bill as introduced. The Vice-Chairman of the Committee directed staff to review these proposed amendments to S. 1703 with the tribal working group prior to Committee action on the bill. Accordingly, the Committee staff met with the tribal working group on October 14, 1987. The working group reviewed S. 1703 and the proposed changes and provided valuable insights and suggestions. On the following day, the Committee staff and the tribal working group met with the Assistant Secretary for Indian Affairs to consider suggestions of the Assistant Secretary, many of which were incorporated in S. 1703.

SECTION-BY-SECTION ANALYSIS

TITLE I—ADMINISTRATIVE PROVISIONS

Section 101. Short Title and Table of Contents.—Section 101 provides that S. 1703 is to be referred to as the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

Section 102. Declaration of Policy.—The existing declaration of policy is amended to emphasize the commitment of the United States to assist individual Indian tribes to strengthen tribal program administration and reservation economices. This change in the statement of policy is intended to strengthen the government-to-government basis of Federal services to tribes, and to emphasize the need for the Federal government to recognize the diversity of individual Indian tribes. This section is also intended to emphasize the need for the Federal government to consider tribal needs on a tribe-by-tribe basis, and to move beyond the tendency to develop "generic" policies applicable to all tribes regardless of needs or conditions. A corollary of this statement is that new tribal policy proposals, if they are to be effective, will have to come from the tribes themselves. Therefore, the Committee amendment declares that the Federal government needs to be more flexible in responding to policies proposed by the tribes.

Section 103. Definitions.—New definitions are added to the Indian Self-Determination Act to clarify the meaning of terms used in the Act.

The term "construction programs" is defined in order to make clear the intent of the Congress that Indian tribes have the right to contract with the appropriate Secretary under the authority of the Indian Self-Determination Act to carry out construction activities and programs including the planning, design, construction, repair, rehabilitation, improvement, and expansion of buildings or facilities. In addition to the specific programs listed in the statute, the term is intended to include pre- and post-construction costs such as site preparation, dredging, land clearance and reclamation. The term "construction programs" also includes programs to construct facilities related to natural resource projects such as timber access roads and fish passage facilities.

The term "contract costs" is intended to insure that the Federal government provides an amount of funds to a tribal contractor that will enable the contractor to provide at least the same amount of services as the Secretary would have otherwise provided. The terms "reasonable and necessary" within the definition of the term "contract costs" is defined to mean all costs that are allowable under Office of Management and Budget Circular A-87, "Cost Principles for State and Local Governments," as published in the Federal Register on Wednesday, January 28, 1981. This means that the Secretary should provide funds to tribal contractors to cover the costs of annual pay cost increases appropriated by the Congress, personnel benefit costs not directly borne by the Bureau of Indian Affairs or the Indian Health Service but incurred by tribal contractors, and similarly, liability insurance costs not incurred by the federal agencies but incurred by tribal contractors.

The term "contract funding base" means the sum of direct program costs plus indirect costs. The intent of the Committee in defining this term is to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary once the contract funding amount has been established. The contract funding base can be reduced only by the tribal contractors or by reductions in appropriations by Congress.

"Direct program costs" include all the funds that are available to the Secretary to operate a program for the benefit of a tribe. These funds are to be provided to a tribe under an Indian self-determination contract. For example, the Secretary is prevented from reducing the amount of funds that would have been available to a tribe for the operation of a program in order to pay for Federal contract monitoring costs.

"Direct program costs" also include that a tribe expends for social services grants, higher education grants and vocational education grants to individuals, and contract health service payments for individuals, and is intended to prevent the Secretary from prohibiting tribes from collecting indirect costs on those so-called pass-through funds. The Federal government incurs administrative costs for administering grants to individuals. Those costs include the costs of personnel in Agency, Area, Field and Central offices directly associated with those programs, along with administrative support staff in the branches of finance, and property and supply. Furthermore, the Federal government incurs costs through the Regional Disbursing Offices which write and distribute the checks to individuals for the Federal agencies. The definition is intended to recognize the fact that there are costs associated with the administration of programs that provide financial benefits to Indian individuals, whether those programs are operated by the Secretary or by a tribe.

The term "indirect costs" is defined to eliminate the confusion that has surrounded the use of the term "contract support costs" in the past. The Committee intends, by defining this term, to make it absolutely clear that the Secretary of the Interior and the Secretary of Health and Human Services should fully fund tribal indirect costs associated with a self-determination contract.

Upon the strong advice of the tribal working group, the Committee avoided using the term "contract support funds" in the drafting of this legislation. That term has been defined to mean, for example, "additional or incremental costs as the result of accepting Public Law 93-638 contracts".[17] While such a definition may seem theoretically valid, there is no practical methodology to measure such costs without efforts disproportionate to the results achieved. The term "indirect costs" is used because it is associated with known management practices. Those practices are recognized and defined in Office of Management and Budget Circular A-87. The circular anticipates a variety of organizational structures, and therefore allows maximum flexibility while excluding unallowable costs.

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[17] "Contract Support/Indirect Cost Rates," Memorandum from the Acting Director of Audit and Investigations to the Assistant Secretary for Indian Affairs (Oct. 16, 1978).

The indirect cost system described in OMB Circular A-87 is used not only by tribal governments, but also by state governments, counties, municipalities, universities, hospitals and nonprofit organizations. The intent of the legislation is to end the confusion by making clear that the Congress supports the payment of indirect costs associated with self-determination contracts, and therefore calls such costs "indirect costs" instead of "contract support costs", a term that cannot be operationally defined. The legislation does not prevent the negotiation and use of lump-sum payments or other similar systems used by contract schools or organizations that have limited sources of funding. Indeed, the provisions under the new section 106 provide for the Department of the Interior Office of Inspector General to communicate more directly with Federal agencies and with tribes, and where necessary, to assist tribes in the use of alternate indirect costs methods including lump-sum agreements, provisional-fixed rates, and multiple rate agreements.

The Committee urges the Appropriations Committees of the Senate and the House of Representatives to substitute the term "indirect costs" for the term "contract support costs" in the budget format for the Bureau of Indian Affairs, and to remove employee displacement costs from the indirect costs (contract support costs) line-item and locate those costs in a more appropriate line-item, such as "employee compensation payments".[18]

A definition of "mature contract" is included in order to simplify reporting requirements for contracts that have been successfully operated by tribes for three or more years. It is the intent of the Committee that self-determination contracts that have been successfully operated for three or more years, and for which there are no significant and material audit exceptions in the most recent annual audit report of the contractor, should, upon the request of an Indian tribe, be treated as "mature contracts" on the date of enactment of this title. The term "significant and material audit exceptions" means: unresolved audit exceptions involving amounts of questioned costs or reporting deficiences; a qualified opinion on the part of the auditor resulting from serious departure from generally accepted accounting principles which call into question the financial results being reported; or clear findings of financial mismanagement or misappropriation of funds.

The term "self-determination contract" means an intergovernmental contract that is not a procurement contract. This definition recognizes the unique nature of self-determination contracts between the Federal Government and Indian tribal governments, or tribal organizations authorized by tribal governments to enter into such contracts with the Federal Government. The Committee amendment also makes clear that self-determination contracts are not procurement contracts, as defined in the Federal Grant and Cooperative Agreement Act of 1977, and that the system of federal acquisition regulations contained in Title 41 of the Code of Federal Regulations should not apply to self-determination contracts.

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[18] See generally "Determining the True Cost of Contracting Federal Programs for Indian Tribes" (The Affiliated Tribes of Northwest Indians, 1987); "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred," (The President's Council on Integrity and Efficiency, 1987); "Trend Analysis Using Data Available From the Indirect Cost Rate Negotiation Process with Indian Tribes," (Department of Interior Office of Inspector General, 1983).

The elimination of otherwise applicable federal procurement law and acquisition regulations, combined with authorization by the Committee amendment of so-called "mature contracts", is intended to decrease the volume of contract compliance and reporting requirements associated with tribal contracts, and to decrease the volume of unnecessary contract monitoring requirements on the Federal agencies. The Committee therefore expects that the federal contract monitoring bureaucracy that has replaced the federal service bureaucracy will be greatly reduced over the next three years.

Technical amendments to the Indian Self-Determination Act enacted in 1984 (Public Law 98–250; 98 Stat. 118) added a new section 9 to the Act which provided that contracts entered into pursuant to the Act were exempt from the requirements of the Federal Grant and Cooperative Agreement Act of 1977.[19] Nevertheless, the Act continued to allow a tribe and the appropriate Secretary to utilize a grant or cooperative agreement instrument in lieu of a self-determination contract instrument.[20]

The differences between self-determination contracts, grants, and cooperative agreements were the subject of extensive discussions with the tribes. The Committee considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement". Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

The term "Secretary" is defined to mean either the Secretary of the Interior or the Secretary of Health and Human Services, or both.

The Committee amendment does not change the definition in current law of the term "tribal organization". The Committee considered the possibility of changing the definition in order to prevent Federal agencies from using the requirement to obtain tribal resolutions as an obstacle to contracting. The Committee believes that the term may at times have been misinterpreted, but that an amendment is unnecessary. The Committee does wish to clarify its understanding, however, of the intent of the requirement to obtain tribal resolutions.

Clearly, the law envisions maintaining tribal government control of the contracting process. These amendments strengthen the requirement for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for "community support for the contract" which the Secretary has correctly interpreted to mean a tribal resolution. However, it is also clear

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[19] (Public Law 95–224, 92 Stat. 3).

[20] Specifically, the Act states as follows: *Provided,* That a grant agreement or cooperative agreement may be utilized in lieu of a contract under sections 102 and 103 of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved."

from the definition of "tribal organization" that a tribal organization needs to obtain tribal resolutions only from the tribes it proposes to serve. For example, if a tribal organization proposes to serve five tribes, then the tribal organization needs to obtain tribal resolutions of support from those five tribes only. To require tribal organizations to obtain resolutions from all tribes in a "service area" is not consistent with the intent and the letter of the law, particularly when a service area is creation of the area office and did not exist prior to delivery of services by the tribal organization.

Another situation involves a tribal organization that proposes to serve one tribe. The tribal organization obtains tribal resolution from that one tribe and enters into a contract with the Secretary. Under existing law, other individuals who are eligible for federal Indian health services but who may not be members of that particular tribe may utilize the services provided by the tribal organization, and tribal organization is authorized to provide services to those eligible Indians. It is the intent of the existing law that the Indian Health Service should not require the tribal organization to obtain resolutions from the tribes with which those individuals are affiliated.

Section 104. Reporting and Audit Requirement.—The Committee recommends that current law be amended to require the Secretary of the Interior and Secretary of Health and Human Services to publish proposed contract reporting requirements in the Federal Register in conformance with procedures required under the Administrative Procedures Act prior to imposing such reporting requirements on contractors. The intent of this amendment is to prevent Federal agencies from imposing unnecessary contract compliance and reporting requirements on tribal contractors through the use of administrative policy directives such as the Indian Self-Determination Memoranda ("ISDM") and the Indian Self-Determination Advisories ("ISDA") which have been used in the past to impose new conditions on tribal contractors.

Similarly, the Committee intends for the amendment to prevent the Bureau of Indian Affairs from requiring tribal contractors to adhere to standards or procedures contained in the Bureau of Indian Affairs Manual. The Committee amendment also prevents the Bureau of Indian Affairs from requiring tribal contractors to utilize financial, procurement, travel and personnel systems or procedures utilized by the Federal Government for the internal operation of Federal agencies. This amendment is further intended to prevent other agencies within the respective Departments, such as the regional offices of the Public Health Service, from imposing new conditions on tribal contractors such as a requirement to conduct additional audits in excess of those required by the Self-Determination Act and the regulations promulgated thereunder.

It should be clear from the intent of the Indian Self-Determination Act that the administrative procedures and methods used by Federal agencies for their own internal operations should not be imposed on tribal contractors. Nor should the Secretary impose requirements on tribal contractors that are more stringent than those imposed on Federal agencies or on private contractors.

The Self-Determination Act enables Federal agencies to provide technical assistance to tribal contractors for the improved manage-

ment of tribal programs, in a noncoercive manner. For example, tribes have the right to develop procurement systems and procedures appropriate to their own organizational needs, for such purposes as central purchasing and for subcontracts. Federal agencies should not force tribes to use federal procurement systems for subcontracts, but should, at the request of the tribe, provide assistance to the tribe in developing and implementing their own procurement systems.

For mature contracts, reporting requirements are to consist of quarterly financial statements, an annual single-agency audit and a brief annual program report. These amendments are consistent with the philosophy that the Federal government should not intervene in the affairs of State, local or tribal governments except in instances where civil rights have been violated, or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act. The purpose of amending the law to include a definition of mature contracts is to decrease unnecessary contract compliance, reporting and monitoring requirements. The amendment provided in Section 104(a) of these amendments is intended to prevent Federal officials from imposing new reporting requirements on tribal contractors unless such requirements are promulgated by regulations consistent with the Administrative Procedures Act.

The Committee recognizes that there may be legitimate needs for information for statistical, research or evaluation purposes, and that these needs may be negotiated with tribes. Tribes may or may not consent to reports for such purposes. Unfortunately, for the past decade, there have been too many instances of reports being imposed on tribes by Federal officials in an arbitray and capricious manner. Too often, tribal officials have been threatened with termination of contract funds if they refuse to submit computer forms, statistical reports, "special" reports, lists of serial numbers of law enforcement vehicles operated by the tribe, certificates of Indian blood for students served by tribal education programs, and other such reports. While such information may be important and useful, there must be agreement between the Federal agency and the tribal contractor on the purposes of such reports. Tribal compliance or noncompliance with such reporting requirements is not to be used by the Federal agencies as the basis for withholding or terminating contract funds.

Section 104(b) requires the respective Secretaries to report to tribes on all staffing and expenditures of Burau of Indian Affairs and Indian Health Service programs operated directly by the Secretary in each respective area. The Indian Reorganization Act of 1934 requires the Secretary of Interior to "advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress".[21] The Bureau of Indian Affairs partially meets this requirement through its budget development system, currently called the "Indian Priority System" and previously called "Band Analysis", "Zero-Based Budget", and

[21] 25 U.S.C. 476.

the "Budget Formulation Process". In practice, however, it has been difficult for tribes and Federal officials to correlate projected budgets with actual expenditures and resources. Often, the base figures used in Bureau budget exercises are based not on actual expenditures, but on estimates based upon the President's proposed budget. Not knowing the actual amount of resources available for the operation of programs makes it difficult for tribes that are planning to enter into self-determination contracts to determine the amount of funds that would be available for tribal operation of the program.

Admittedly, the Bureau of Indian Affairs makes an attempt to at least involve tribal officials in the development of projected budgets. In many Service Areas, however, the Indian Health Service makes no attempt at all to cooperatively plan budgets and programs with affected tribes. Requiring Area Directors, Agency Superintendents and Service Unit Directors to report annually to tribes on staffing ceilings and filled positions, funding obligations and actual expenditures will provide a base of information which is necessary for tribes and Federal officials to jointly and cooperatively plan for the best use of those financial and staffing resources at the tribal and area levels.

Section 105. Carryover Funding.—Section 8 of the current law authorizes tribes to carry over from one fiscal year to the next fiscal year unobligated or unexpended funds under a self-determination contract. The amendment clarifies that when such funds are carried over from one year to the next, and if the funds are to be expended in the succeeding fiscal year for the purposes for which they were originally appropriated, contracted or granted, that no additional justification or documentation of such purposes need be provided by the tribal organization to the Federal agency as a condition of receiving or expending such funds.

TITLE II—INDIAN SELF-DETERMINATION ACT AMENDMENTS

The Indian Self-Determination Act is amended by consolidating provisions for contracts with the Secretary of the Interior and provisions for contracts with the Secretary of Health and Human Services into Section 201.

Section 201. Self-Determination Contracts.—Section 201 continues the direction in sections 102 and 103 in the existing law to the Secretary to enter into a self-determination contract with a tribal organization at the request of a tribe. The Committee amendment clarifies the procedure for contracting. The Committee amendment also clarifies the respective roles of the Federal Government and the tribes during the development and implementation of self-determination contracts.

The intent of the Committee in section 102 is to clarify that the authority for a tribal organization to enter into a self-determination contract with the Secretary is a resolution of the governing body of an Indian tribe or Alaska Native village. While this preserves and strengthens the control of tribes over the decision to contract or not to contract, it is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts (see the discussion of the term "tribal organization",

above). A well-managed tribal organization will periodically report to and coordinate efforts with the tribes it serves.

This change in the law is not meant to change the existing practice of tribes that provide a one-time, open-ended resolution authorizing a tribal organization to request contracts from year to year. The guiding principle is that the tribal governing bodies should determine how frequently tribal organizations are reauthorized to enter into contracts. Similarly, tribal governments should make their own determinations about the frequency and nature of oversight of contracts with tribal organizations.

These amendments, while providing the stability of mature contracts, are not intended to decrease the ability of tribal governments to exercise oversight of self-determination contracts. This oversight includes the right of a tribal government to rescind support for a self-determination contract when the tribal organization no longer appropriately meets the needs of the tribe. Such authorization to contract and oversight of the contract by the tribal governing body should be conducted without coercion by the Federal agencies.

Section 201 restates current law which authorizes tribes to contract to operate programs authorized by the Johnson-O'Malley Act of 1934, the Snyder Act of 1921 and the Transfer Act of 1954. Restated in the amendments is important language regarding the contractibility of programs which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) and any Act subsequent thereto. The purpose of restating this language is to clarify that the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts. Tribes have the right to contract for BIA Agency functions, IHS Service Unit functions, and BIA and IHS Area Office functions, including program planning and statistical analysis, technical assistance, administrative support, financial management including third party health benefits billing, clinical support, training, contract health services administration, and other program and administrative functions. The tribes also have the right under the Indian Self-Determination Act to work with the Secretary to redesign BIA and IHS Area Office, Field Office, Agency and Service Unit functions to better meet the needs of the tribes served directly by such offices.

The Committee believes that in requiring the Secretary of the Interior to enter into a self-determination contract, at the request of an Indian tribe, to plan, conduct and administer programs or portions thereof administered by any agency within the Department of the Interior, the Act is intended to include, for example, programs of the Bureau of Reclamation or the United States Fish and Wildlife Service, for which funds are appropriated by the Congress for the benefit of such tribe.

The Committee has also included language to direct the Secretary to enter into contracts with tribal organizations to plan, conduct and administer any or all of the functions, authorities and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended. The intent of the Committee is that administrative functions of the Indian

Health Service are contractible under the Indian Self-Determination Act.

The Committee intends for Section 102(a)(1)(iv) of the amended Act to ensure that the Secretary may enter into a contract with a tribal organization, at the request of an Indian tribe, to administer programs or portions thereof, for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior. Examples of such programs include Environmental Protection Agency programs administered by the Indian Health Service and Department of Education "Chapter I" and education of handicapped children programs administered by the Bureau of Indian Affairs.

Section 102 as amended further authorizes tribes to contract with the Secretary to operate any program, or any portion of any program, without regard to the organizational level that such program is operated within the Department of the Interior or the Department of Health and Human Services. Again, this emphasizes the intent that tribes are authorized to contract with the Secretary to operate headquarters, area office, field office, agency and service unit functions, program or portions of programs.

Section 201 of the Committee amendment revises current contract application procedures by eliminating some of the declination criteria including, specifically, clause (F) of sections 102(a) and 103(a) which allows either Secretary to decline a contract on the grounds that the contract proposals fail to contain "other necessary components of contract performance". The Committee amendment directs both secretaries to approve contract proposals within ninety days unless the Secretary provides a basis, as provided in the Act, for declining a contract. The burden of proof for declination is on the Secretary to clearly demonstrate that a tribe is unable to operate the proposed program or function. The intent of the Committee in retaining the declination criteria and the declination process is to insure that denials of requests for self-determination contracts are handled only through the declination process.

The current practice of Federal agencies that impose "threshold criteria" on a self-determination contract application is clearly inconsistent with the intent of the Indian Self-Determination Act. Furthermore, it is contrary to the intent of the Indian Self-Determination Act for a Federal agency simply to fail to enter into a contract without providing to the tribal organization a formal notice of declination that states the grounds for declination and provides an opportunity and procedures for an appeal hearing within sixty days of receipt of a proposal to contract. The ninety-day and the sixty-day time frames for approval or declination of the contract both begin simultaneously upon receipt of the proposal. Section 102 and 103 of the Indian Self-Determination Act now require that, whenever an application by a tribal organization is declined by the Bureau of Indian Affairs or the Indian Health Service, the Federal agency must provide the applicant with a hearing to contest. The intent of the Indian Self-Determination Act is to assure that a tribal organization receives a hearing "on the record" in accordance with the requirements of the Administrative Procedures Act.

This section clarifies that tribes are eligible to contract for any program or function operated by either Secretary for the benefit of tribes, regardless of whether such specific programs or functions are operated locally. For example, a tribe may need to conduct a natural resources planning and management program under a self-determination contract. The fact that natural resources planning and management is not operated locally by the Bureau of Indian Affairs agency office should not prevent the Secretary from entering into a contract with that tribe. Furthermore, the fact that the Secretary has decided to allocate funds to a local agency in a particular manner should not bar the tribe from contracting for functions, such as criminal investigation, for which funds have not been allocated to that particular agency.

The Committee intends for section 102(a)(2) as amended to authorize tribes to enter into contracts with the Secretary to carry out trust related functions. Clearly, the Secretary of the Interior continues to maintain a trust responsibility for tribal resources when the tribe operates a program under a self-determination contract. Section 102(a)(2) allows tribes to contract for trust functions including but not limited to real estate appraisals, soils inventories, water resources studies, lease permits, land use zoning studies, forestry management and fire suppression, minerals inventories, environmental quality assessments, archeological resource studies, fish and game studies, cadastral surveys, land title and records management, lease compliance, trust fund investment and accounting services, facilities maintenance and repair. The intent of the law is to enable tribes to improve the protection of trust resources by operating the technical functions relating to the trust responsibility while preserving the Federal Government's obligations as trustee for Indian lands and resources.

Under the Committee's amendment, the Secretary of the Interior remains responsible for the protection of Indian trust resources. The quality of that trust responsibility, however, is dependent upon the quality of the supportive documentation, research and analysis, options and recommendations. Indian tribes are most often the "front line of defense" in protecting tribal trust assets. Consequently, tribes often are in the best position to provide the technical services that will afford the best possible protection of trust resources by the Secretary.

The protection and management of tribal trust resources should be viewed as a joint effort of the tribe and the Secretary. If tribal contracting of trust-related functions is to be declined, the Secretary's burden of proof is to demonstrate that a tribal organization's operation of those functions will lead to inadequate protection of trust resources.

The Secretary is authorized by Section 102(a)(4) to allow tribes to consolidate two or more mature contracts into a single contract. This amendment simplifies contract administration, including authority for tribes to consolidate letter of credit functions and advance payment system functions, and authority for tribes to submit consolidated quarterly financial reports and a consolidated annual report, rather than having to unnecessarily duplicate reporting requirements. The Committee understands that tribes and the Secretary may want to consolidate funding for purposes of administra-

tive flexibility. The Secretary and the tribes should propose procedures to the Congress to allow tribes to reprogram funds within consolidated contracts to better address tribal priorities. This section does not prevent flexible financial administration within the bounds of generally accepted accounting standards and practices.

Section 201(b) maintains and strengthens the procedures for declining to enter into a self-determination contract. As discussed above, "threshold criteria" are not authorized by the Self-Determination Act. In addition, the practice of simply failing to enter into a contract, when the tribal organization has submitted an application for a self-determination contract, is contrary to the Act. The Secretary may decline to enter into a self-determination contract only if the Secretary utilizes the declination criteria and procedures outlined in Section 201, and provides the tribal organization with a statement of declination in writing within sixty days of the receipt of the application. The Secretary must inform a tribe in writing of its opportunity for a hearing. Such hearing should be a due process hearing "on the record" conducted in accordance with the requirements of the Administrative Procedures Act.

As originally enacted, the Self-Determination Act authorized either Secretary to require that tribal contractors to obtain liability insurance. The Act also precluded insurance carriers from asserting the tribe's sovereign immunity from suit.

In practice, the costs of such liability insurance have been taken from the amount of funds provided to the tribal contractor for direct program costs or for indirect costs. The Committee is concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries.

It is clear that tribal contractors are carrying out federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function. Consequently, section 201(c) of the Committee amendment provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out self-determination contracts are considered to be employees of the Federal Government.

The Committee amendment does nothing to change the status of contract care physicians employed by the Indian Health Service. The Indian Health Service provides two types of health care services, one known as direct services and the other known as contract care services. Appropriations for contract care services are contained in a budget activity that is separate from the budget activity for direct care services, which include hospitals and clinics, dental services and mental health services. Under the contract care appropriation, the Indian Health Service enters into contracts with private physicians or other health care providers to serve eligible Indians. Such physicians are not employees of the United States; they are independent contractors. Under the Federal Tort Claims Act their acts of negligence cannot be imputed to the United States. Di-

rectly-provided Indian health care services are a different matter. Such services are provided by Indian Health Service employees.

A patient claiming an injury in connection with the provision of direct services is limited to the remedies available under the Federal Tort Claims Act in any action against the United States. This provision is intended to cover claims against a tribal contractor for acts or omissions that occurred prior to the bill's enactment but for which the statute of limitations has not yet expired. Under current law, the contractors are required to carry malpractice insurance coverage for such past claims. This so-called "tail liability" coverage is even more expensive than coverage for current claims.

When an Indian tribe enters into a self-determination contract, the tribal contractor likewise administers direct care and contract care programs. That is, the tribal contractor typically hires employees to provide a wide range of direct care services. In addition, the tribal contractor may administer a contract health care program and thus administer contracts with private health care providers. The Committee does not intend the extension of Federal Tort Claims Act protection to private physicians or other private health care providers who may be providing contract health care under a self-determination contract to a tribal organization. Consistent with the manner in which coverage is extended for providers of direct health care services, section 102(c)(2) of the Act, as amended by the Indian Self-Determination Act Amendments, would protect only the employees of a tribal organization, not those with whom the tribal organization may contract to provide contract care. Only direct health services would be under the protection of the Federal Tort Claims Act.

The Committee amendment is not intended to expand the liability of the Federal Government to include claims for violation of statutory obligations not otherwise required of tribes. For example, tribes are specifically exempted from the Fair Housing Act of 1968 and the Equal Employment Opportunity Act. The Committee amendment is not intended to impute liability upon the United States for actions of Indian tribes which, if undertaken by any other person or entity, may be contrary to these or other Federal Acts.

The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility. Under current law, a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance, and then to be subjected to litigation without any of the protective and very restrictive provisions which apply to litigation under the Federal Tort Claims Act. The Indian Self-Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act. The amendment to the Act will not increase the Federal government's exposure under the Federal Tort Claims Act. On the contrary, the amendment will only main-

tain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self-Determination Act.

Section 202. Technical Assistance and Grants to Tribal Organizations.—Section 104 of the Indian Self-Determination Act is redesignated as section 103, and a new subsection 103(d) is added which directs the Secretary to provide technical assistance to tribes in the preparation of contract applications.

A new subsection 103(e) would authorize the Secretary to provide a grant to a tribe to obtain technical assistance in program planning and evaluation, and in the development of management systems, whether or not such technical assistance is available from a Federal agency. Technical assistance may be provided by sources chosen by the tribe. These sources may include other tribes, tribal organizations, local experts, state and county agencies, and other groups. It is apparent that many tribal organizations have greater technical capabilities in the areas of program planning and evaluation, and management systems development than the Bureau of Indian Affairs or the Indian Health Service. For too long, however, federal agencies have monopolized technical assistance funds and have used those resources to establish centralized offices for technical assistance which are inaccessible to most tribes, or have provided grants to organizations which are unfamiliar with the local needs and conditions of tribal governments.

The Committee amendment also enables tribes to obtain assistance from other tribes that possess expertise in certain areas, for example, fish and game management and enforcement. Furthermore, the amendment allows tribes to obtain technical assistance from private health providers in planning the financial management systems for clinics and hospitals. Not only will such interaction lead to improved program planning, it could also lead to improved intergovernmental cooperation when tribes obtain technical assistance from local government sources in such areas as zoning ordinances, environmental quality planning, and other technical areas.

The new Section 103(e)(2) would enable tribes to conduct functional analyses of operations and responsibilities and to develop reorganization plans for Federal agencies serving the tribes including Areas Offices, Field Offices, Agency Offices and Service Units. Obtaining a grant to conduct such planning, designing, monitoring and evaluation of Federal programs, while obviously helpful to such tribes, is not be a precondition for tribes to conduct such analyses or to develop such plans. A fundamental premise of the Self-Determination Act is that self-determination involves more than just contracting. Tribes also have the right not to contract. Instead, tribes may participate with Federal agencies in cooperative, joint planning efforts to determine the manner in which those Federal agencies may better deliver federally-operated services to such tribes.

The Committee is aware that in Fiscal Year 1987 the Bureau of Indian Affairs in Alaska unilaterally removed certain historic recipients of grants under section 103(a) (formerly section 104(a)) of the Indian Self-Determination Act, from further participation in

the self-determination grant program. This has particularly been the case in the Juneau Area. This action is contrary to the intent of the Congress, and the Committee intends that tribes and villages which in past years have participated in the program shall remain eligible to receive self-determination grants.

Section 203. Personnel.—Section 105 is redesignated as section 104. The authority to allow federal employees who transfer to tribal employment to retain civil service benefits is made permanent. The current law is updated to provide for Federal Employee Retirement System (FERS) benefits. It is not the intent of the Committee under section 203 to confer upon Federal employees who transfer to employment under a tribal organization an additional benefit of sick leave credited toward retirement not available to other FERS employees in the Federal government.

The Committee amendment will allow greater flexibility for tribal contractors who utilize federal employees under the Intergovernmental Personnel Act (IPA). Where an employee under an IPA placement leaves, the tribe and the Secretary may replace that employee with another willing to serve in the position, and may renegotiate the IPA agreement. Federal employees under IPA placements may be eligible for step and pay increases on the same basis as other federal employees.

In order to ease the burden on Indian preference employees who may be displaced as the result of contracting, the Committee amendment allows Indian preference employees who are under excepted service to be reclassified as competitive service personnel. The amendment will allow displaced federal employees to compete government-wide for jobs. Furthermore, financial assistance is authorized for Bureau of Indian Affairs and Indian Health Service employees who are displaced as the direct result of contracting.

Section 204. Administrative Provisions.—Section 106 of the Indian Self-Determination Act is redesignated as section 105. Subsection 105(a) is amended by providing that federal procurement laws and the system of federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations shall not apply to Indian self-determination contracts.

The Indian Self-Determination Act is amended to provide authority for mature contracts to become permanent contracts. The time frame for new contracts is there years, unless the appropriate Secretary determines and the tribe agree that a longer term would be desirable. The limited time frame for new contracts is appropriate for contracts for activitie which are not permanent in nature such as construction projects. The Committee intends that the time frame for mature contracts will be indefinite. The Committee included this specific language in section 104 at the suggestion of the Administration, to clarify that mature contracts would have no time limit. This change is consistent with the fact that tribal government functions such as law enforcement, social services and health services are permanent tribal government functions. Of course, mature contracts may be terminated by the Secretary for violations of the Indian Civil Rights Act of for mismanagement, as provided for in Section 109 of the Act. Mature contracts may also be terminated by tribal organizations through retrocession.

Section 204(d) authorizes the Secretary to begin using the calendar year as the annual timeframe for contracts and agreements under the Indian Self-Determination Act except where the Secretary and the tribal organization agree on a different period. Many tribal contractors have experienced considerable problems with cash flow at the beginning of the fiscal year due to the problem of delays in the enactment of annual appropriations legislation and the consequent delays in allocating funds to the Federal agencies and the tribes. Most of the problems occur during the first quarter of the Federal fiscal year, e.g., October through December. Many tribes have been forced by delays in placing contract awards on the letter of credit system to borrow from commercial banks in order to maintain program operations. Routinely, tribes have been unsuccessful in recovering interest costs necessitated from the Federal agencies. Section 105(b)(2) directs the Secretary to submit a report to the Congress within 90 days of enactment of these amendments on the amounts of additional obligational authority needed to implement this section in fiscal years 1988 and 1989.

Section 205 amends section 104(d) of the Act by designating such section as section 105(e) and by changing the time frame for retrocession of a contract under the Indian Self-Determination Act from one hundred and twenty days to one year from the date of the request, unless the Secretary and the tribal organization mutually agree to a different date.

The Self-Determination Act is amended in subsection 105(f) to allow the Secretary to transfer to tribes property purchased with contract or grant funds. This should simplify property inventory and reporting requirements.

Section 205. Contract Funding and Indirect Costs.—A new section 106 is added to the Act to clarify provisions for funding self-determination contracts, including indirect costs. This section protects contract funding levels provided to tribes, and prevents the diversion of tribal contract funds to pay for costs incurred by the Federal government. The protection of contract funding will provide year-to-year stability for tribal contractors, and will contribute to better tribal planning, management and service delivery.

It is apparent from the wording of the new section 106(a) that the Committee is strongly committed to the principle of assisting tribes to succeed in their efforts to plan, manage and operate programs and services under self-determination contracts. Actions by Federal agencies to reduce tribal contract funding to pay for Federal computer equipment acquisiton, contract monitoring, employee displacement, pay costs and retirement costs frustrate the intent of the Indian Self-Determination Act and are contrary to the purposes of the Act. The intent of these amendments is to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies.

The Bureau of Indian Affairs maintains that many of the reductions to tribal contract budgets result from tribes giving a low ranking to programs such as social services or self-determination grants on the "Indian Priority System." It appears from the testimony submitted to the Committee, however, that many of these reductions are made in direct contravention of tribal funding prior-

ities, and are implemented long after tribes have participated in the "Indian Priority System" rankings.

Section 106(a)(5) would prevent the Secretary from reducing funds for a self-determination contract, except in response to a reduction in appropriations enacted by the Congress. Such a reduction should be a proportional, across-the-board reduction. For example, if the Congress appropriates a funding reduction of 2 percent, the federal agencies should not impose reductions greater than 2 percent on tribal contractors, except at the request of tribal contractors. These amendments are intended to prevent Federal agencies from passing on the entire amount, or a disproportionate amount, of a reduction in Congressional appropriations, to tribal contracts in order to protect the base for Federally-operated functions.[22]

Furthermore, it appears that the BIA funded pay increases for agency employees and passed on the entire burden of the budget reductions to tribal contractors. In many BIA Agencies, tribal higher education funds were reduced and Agency executive direction funds were increased in spite of the fact that tribes, in their "Indian Priority System" rankings, had ranked higher education as their top priority and executive direction as the lowest priority.

The Committee believes that practices such as these call into question the validity of the "Indian Priority System". Section 106(a)(5) does not prevent or eliminate tribal input into the Bureau of Indian Affairs budget development system. However, that system will need to be reexamined in light of these amendments. Similarly, in fiscal year 1986 the Indian Health Service directed tribes in some areas to reduce tribal contract budgets by 5% in response to the Congressionally-imposed sequestrations, in spite of the fact that the Indian Health Service had a protected limit of a 2-percent sequestration under the Gramm-Rudman law. The intent of these amendments is to prevent such administrative reductions of tribal contract funds.

The Indian Health Service has expressed a concern that Section 106(a)(5) would prevent the service from reallocating fund in order to achieve equity. The Committee is concerned about the need to achieve equity. Clearly, an Indian patient served in a federally-operated facility should receive at least the same amount of care and services and an Indian patient served in a tribally-operated facility. However, the Committee is concerned about the manner in which the Indian Health Service has utilized the resource allocation methodology in fiscal year 1987. For example, in the Alaska Area, tribal contractors and IHS facilities were "tapped" for 2 percent of their funds. The area director redistributed all of the available resource allocation funds to three federal facilities in the Alaska Area and provided $312,000 to the Alaska area office for program management purposes. Such actions called into question the validity and purposes of the service unit resource allocation methodolo-

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[22] In fiscal year 1986 for example, the Congress imposed a 4.3 percent sequestration of all Bureau of Indian Affairs programs, plus an across-the-board reduction in Interior appropriations of 0.06 percent. Even after the sequestrations and the across-the-board reductions were imposed, the Bureau of Indian Affairs has more funds in fiscal year 1986 than in fiscal year 1985 for vocational training and "all other social services". Nevertheless, the Bureau reduced funding for many tribal programs from 16 percent to 25 percent in response to the reduction orders.

gy. It is clear that the Indian Health Service needs to address questions about the equitable allocation of Indian Health Service resources. The amendment allows the Indian Health Service to present a plan to the Congress, for Congressional approval through the appropriations process, for the reallocation of resources to achieve equity.

The new Section 106(b) would require the Secretary of the Interior and the Secretary of Health and Human Services to annually submit to the Congress an accounting of the amounts of funds provided to tribes for direct and indirect costs for each program during the most recent fiscal year. The annual report shall include an accounting of any deficiency of funds needed to provide required indirect costs for all Indian Self-Determination contracts for the current fiscal year. These annual reports are needed by the Congress in order to provide reliable and objective data on which to base funding needs for indirect costs. These reports shall be provided to the Congress no later than March 15 of each year. The data requested on tribal indirect cost rates has already been collected by the President's Council on Integrity and Efficiency for its report entitled "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred." Therefore, providing this data on an annual basis will involve simply updating on an annual basis the data already collected and available. This data is needed to answer questions from the Congress and from the Federal agencies on the need for indirect costs and the types of expenditures of indirect cost funds. Furthermore, the Committee hopes that the Secretarial reporting activities related to assistance provided to tribes and requests from tribes for technical assistance will facilitate increased communication and coordination between the Department of Interior Office of Inspector General, the Bureau of Indian Affairs, the Indian Health Service and the tribes. It is further contemplated that such improved coordination and communication may lead to broader use of "provisional/fixed" rates and multiple rates, and innovations such as the negotiation of multiyear rates, or the negotiated lump-sum agreements recommended by the President's Council on Integrity and Efficiency.

Under the new Section 106(c) tribes will not be held liable for uncollectable indirect costs from agencies other than the Bureau of Indian Affairs or the Indian Health Service, for purposes of determining indirect cost rates in subsequent years. The intent of this provision is to alleviate the problem caused by the failure of Federal agencies other than the Bureau of Indian Affairs or Indian Health Service to pay in full their portion of the negotiated indirect costs associated with grants from those agencies.

The new section 106(d) provides that Indian tribes shall not be held liable for amounts of indebtedness to the Federal government attributable to theoretical underrecoveries and overrecoveries and actual underrecoveries incurred prior to fiscal year 1988. Clearly, it is not the intent of the Congress to penalize tribes for complicated problems that have been caused by situations beyond their control. It should be emphasized that no theoretical overrecovery and underrecovery problems identified by the Committee have been caused by poor management. Rather, the cause of these problems is the failure of federal agencies to pay their fair share of indirect

costs. Given the protections and remedies of these amendments, such forgiveness of underrecoveries and overrecoveries is limited to indebtedness incurred prior to fiscal year 1988.

The new Section 106(e) would provide a time limit of 365 days on disallowing contract costs after receipt of the annual single agency audit report. This time limitation of 365 days applies also to any required audit reports submitted by tribal organizations prior to enactment of these amendments. While it is important to review audit reports, it is not in the interests of tribes or the Federal agencies to disallow costs and enforce actions against tribes years after the submission of a final audit report. This provision is expected to result in more timely review of annual audit reports.

Section 106(f) provides that the Secretary of the Interior shall not remove or alter any program or portion thereof in the Indian Priority System except human to an Act of the Congress. This prohibition applies to any system that the Secretary may utilize to meet the responsibilities of the Secretary under section 476 of title 25 of the United States Code to advise the tribes of all appropriation estimates or Federal projects for the benefit of the tribes prior to submission of such estimates to the Office of Management and Budget and the Congress. The Secretary is directed to publish in the Federal Register a notice of intent at least one hundred and eighty days prior to the date of seeking such authority. The Federal Register notice shall provide a statement of the impact on base funding levels for each affected Agency and tribe.

The new Section 106(g) would require the Secretary to add indirect costs to the amount of funds provided for direct program costs associated with self-determination contracts for the initial year of tribal program operation, upon the request of the tribal contractor. Section 106(g) is intended to require the Secretary to provide indirect costs for each contract year in addition to the program funding which would have been available to the Secretary to operate a contracted program and to prohibit the practice which requires tribal contractors to aborb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting. The combined amount of direct and indirect costs shall then be available for each subsequent year that the program remains continuously under contract. While the Committee has concerns about the changes in the methods of budgeting for and allocating indirect cost funds, whether those methods be the so-called "grandfather" approach, the single line-item indirect cost fund, or some other method, the Committee does not believe that it should determine the method of distribution. The "grandfather" approach and the "single fund" approach both have advantages and disadvantages from the perspective of Federal agency budgets and from the perspective of individual tribal contracts. It is the Committee's hope that the Department of the Interior Office of Inspector General, the Bureau of Indian Affairs and the Indian Health Service will coordinate their efforts with the tribes to develop the most effective method of distributing indirect cost funds. The Committee amendment will insure that, whatever method is used, the tribal contractor will realize the full amount of direct program costs and indirect costs to which the contractor is entitled. Furthermore, the Commit-

tee amendment is intended to insure that the funds needed are continuously available, unless the Congress reduces such funds by appropriations actions.

A new section 106(h) provides that for construction contracts, a tribe is entitled to the full amount of indirect costs based on the total amount of funding if the tribe conducts its own construction, including construction under the Housing Improvement Program. If the tribe subcontracts the construction, the tribe will be able to collect indirect costs only on the amount of funds used by the tribe to oversee the construction subcontract(s).

Section 206. Contract Appeals.—A new section 110 is added to the Indian Self-Determination Act. Section 110(a) confers upon the United States District Court original jurisdiction, concurrent with the Court of Claims, over civil actions or claims arising under the Self-Determination Act. Section 110(a) provides parties aggrieved by federal agency violations of the Self-Determination Act the right to seek injunctive relief in the United States District Courts. The provision also allows an aggrieved party to seek money damages in the Court of Claims or in the district court.

Section 110(d) allows a self-determination contractor to seek judicial review pursuant to the Contract Disputes Act of a decision of an agency contracting officer or of an agency board of contract appeals. Under this provision, a tribal contractor may secure relief in the United States District Courts, including orders that require the offending agency to pay amounts required by the plaintiff's contract. The Committee amendment leaves unchanged existing law allowing direct recourse to the United States Court of Claims for review of contracting officers' decisions.

The Committee amendment affords self-determination contractors the opportunity to secure injunctive relief against the Bureau of Indian Affairs or the Indian Health Service for violations of the Self-Determination Act (or the terms of contracts under the Act) rather than being put to the cost of having to file multiple, annual claims to recover contract damages resulting from such violations, while the same violations continue unchecked.

In *Appeals of Papago Indian Tribe of Arizona,* [23] the Interior Board of Contract Appeals ruled that contract disputes before the Board involving self-determination contracts were not subject to the Contract Disputes Act. The *Papago* decision extended an earlier ruling in *Busby School of the Northern Cheyenne Tribe* v. *United States* [24] that the Contract Disputes Act did not apply to self-determination contractors' claims before the Court of Claims. If given general application, these rulings may have the effect of rendering self-determination contractors who are prevailing parties in such proceedings ineligible to seek an award of legal fees under the Equal Access to Justice Act [25] under which "adversary adjudications" at the administrative level subject to the Act are defined in

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[23] IBCA-1822 and 1966 (March 17, 1986).
[24] 8 Cl. Ct. 596 (1985).
[25] Public Law 96-481 (Act of August 1, 1980, 94 Stat. 183).

part by reference to proceedings under the Contract Disputes Act.[26]

Section 110(c), then, reinstates the law as it existed prior to the *Busby* and *Papago* decisions, placing self-determination contractors on an equal footing with other federal contractors by allowing them to make application for an award of legal fees under the Equal Access to Justice Act when they are the prevailing party in an agency board of contract appeals proceeding involving a contract under the Indian Self-Determination Act.

Section 110(c) also makes the Equal Access to Justice Act applicable to other administrative hearings and appeals procedures for resolutions of disputes within the Department of the Interior and the Department of Health and Human Services when those proceedings are invoked to enforce the Self-Determination Act or contract rights under the Act, whether the non-federal party involved in those proceedings is a self-determination contractor or is a member of the affected Indian tribe or community who is personally injured by agency action in violation of the Self-Determination Act or the terms of contracts entered into under that Act intended to benefit that community. Thus, under section 110(a), Bureau of Indian Affairs proceedings under 25 CFR, Part 2 or 25 CFR, Part 271.81 respecting contracts under the Self-Determination Act, and comparable Indian Health Service proceedings would be made subject to the Equal Access to Justice Act just as proceedings before the agency boards of contract appeals.

Section 110(c) does not change existing law allowing self-determination contractors who prevail in contract disputes in the United States Court of Claims to seek an award of legal fees under the Equal Access to Justice Act, nor to the existing law allowing non-contractor plaintiffs to seek such fees upon prevailing in the United States District Courts. Section 110(a) and (d) would make the same relief available to self-determination contractors who prevail in similar claims in the United States District Courts.

Section 110(c) also leaves unchanged certain provisions in the existing law concerning treatment of legal expenses by self-determination contractors. Under these provisions, contractors may treat legal expenses incurred in administrative proceedings within the Department of the Interior or the Department of Health and Human Services involving enforcement of self-determination contract rights as allowable costs incurred in the administration of those contracts.[27] Self-determination contractors may not use indirect costs, however, to pay for legal fees incurred in prosecuting claims for monetary relief against the Federal Government in court. This contrasts with the more stringent rules applicable to standard procurement contracts in which a profit factor is built

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[26] *See* 5 U.S.C. 504(c)(2)(B). The 1985 amendment was made in part to overturn the decision in *Fidelity Construction Company* v. *United States*, 700 F.2d 1379 (Fed. Cir.), *cert den.* 104 S. Ct. 97 (1983), which had held that only agency administrative appeals and proceedings mandated by law were subject to the Equal Access to Justice Act, a ruling inconsistent with the original intent of the Congress in passing the Equal Access to Justice Act.

[27] See 25 CFR, Part 276, Appendix A, Part II, Paragraph B.16 (applicable to all self-determination contracts with the Bureau of Indian Affairs) and Circular A-22, Paragraph 34d (applicable to self-determination contracts with the Indian Health Service) or OASC-10, Attachment B (FMC 74-4), Paragraph B.16 (applicable to self-determination contracts with the Indian Health Service).

into the contract price (no profit is allowed on self-determination contract), in which no trust responsibility exists between the contracting parties (the federal government's trust responsibility tempers all of the ordinary contract rules as applied to self-determination contracts), and as to which a primary government objective is to receive the maximum amount of goods or services for the lowest cost (under section 106(h) of the Self-Determination Act, the Federal Government is required to fund self-determination contracts at the same level as would be available to the federal agency to operate the program absent the contract).

Section 110(d) subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act. Among the most important of these is the requirement that agency contracting officers make prompt decisions on contract disputes. Under existing law, contracting officers administering self-determination contracts face no enforceable deadlines for making decisions on contract disputes and are in effect free to sit on such disputes indefinitely, which they frequently do. This is one of the problems the Contract Disputes Act was intended to cure. This amendment also provides to self-determination contractors the same favorable treatment as to interest on amounts in disputes which is now given to other federal contractors. Thus, under the Contract Disputes Act, computation of interest on the claims for a prevailing party begins at the time the dispute is filed with the contracting officer. Under contract disputes not covered by the Contract Disputes Act, such interests runs from the time the claim is filed with a reviewing Board of Contracting Appeals rather than from the time the claim is filed with the Contracting Officer. The *Busby* and *Papago* decisions took those protections away from self-determination contractors. This amendment restores those protections.

The proposed new section 110(e) would make the amendments at the new section 110(c) and section 110(d)(1) retroactive for a limited class of cases, to protect those self-determination contractors who were deprived of the protection of the Contract Disputes Act (and derivatively the Equal Access to Justice Act) by the *Papago* decision as to proceedings pending before the Interior Board of Contract Appeals involving Indian Self-Determination Act contracts as of March 17, 1986 (or subsequently), the date the Interior Board of Contract Appeals first applied the *Busby* ruling to such board proceedings in the *Papago* decision.

Self-determination contractors which are substantially prevailing parties in such proceedings which terminated between March 17, 1986 and the date of enactment of these amendments, are given a 30-day grace period to make application for an Equal Access to Justice Act fee award.

Comparable provisions were utilized to allow for limited retroactive effect when the 1985 Equal Access to Justice Act amendments were enacted to protect contractors adversely affected by the *Fidelity* decision.[28]

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[28] Public Law 99-80 (Act of August 5, 1985, 99 Stat. 183, Section 7 (b) and (c)). See compiler's notes to 5 U.S.C. 504 as to effective date.

The provision for such limited retroactivity is appropriate to ensure that those Indian Self-Determination Act contractors who were adversely affected by the *Papago* ruling will be accorded treatment equal with that originally intended by the Congress and as provided for in this amendment. The same rationale gave rise to the limited retroactivity provisions provided in the 1985 Equal Access to Justice Act amendments.

The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. Tribal contractors are denied access to injunctive relief to compel agency compliance with the law where the effect of any court order would be to require the Federal government to add funds to the plaintiff's contract.[29] Furthermore, tribal contractors are unable to recover legal fees under the Equal Access to Justice Act even when they prevail on contract disputes in agency administrative proceedings. Tribal contractors are obliged to utilize their limited indirect cost funds to pay for legal fees rather than to cover other essential administrative costs.

Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affiars has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms. Thus, in a pending Interior Board of Contract Appeals proceeding, the Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate as approved by the Department of the Interior Office of Inspector General (the cognizant Audit Agency for self-determination contracts with the BIA), that the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid. That is, the contractor could not recover ordinary contract damages for the Bureau's breach in failing to fully fund the contract. The type of funding violation involved in that instance was not the product of a Congressional appropriation shortfall, but of a unilateral decision by the BIA to fund indirect costs for the contractor pursuant to a method other than that provided for in the contract and the applicable law. The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument.

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[29] See *Alamo Navajo School Board, Inc., et. al.* v. *Andrus*, 664 F. 2d 229 (10th Cir. 1981).

To compound this problem, the Department of the Interior's auditors propose pursuant to the standard terms of the contractors' negoitiated indirect cost agreement, to treat the contractor as if it had collected from the BIA the entire amount of indirect costs to which it was entitled under the contract; and, on such assumption, since the contractor did not spend or incur costs at the contractually mandated level, to assume that those funds had been saved and to penalize the contractor in a future year by reducing its indirect costs by the amount of the contractors' presumed savings. This will have the effect of twice penalizing the contractor for the BIA's failure to fund the contractor's indirect costs at the level required by law and the contract terms. This argument reflects a total disregard for the intent of the Congress as expressed in the Indian Self-Determination Act, an abandonment of the BIA's trust obligations to tribal contractors, and amply illustrates the necessity of enacting the remedial measures provided in these amendments.

Section 207. Promulgation of Rules and Regulations.—The provisions for regulations in the Act are updated to require the Secretary of the Interior and the Secretary of Health and Human Services to promulgate self-determination contract regulations consistent with the intent of these amendments in Title 25 of the Code of Federal Regulations. The exemption of self-determination contracts from the federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations results in the need for the respective Secretaries to reissue Indian self-determination regulations. The Indian self-determination regulations currently contained in Title 25 and Title 41 of the Code of Federal Regulations shall be used as the starting point in developing new Indian self-determination regulations. The Committee intends that until new regulations are promulgated, the existing regulations, along with the amended Indian Self-Determination Act, shall form the basis of legal and regulatory authority for negotiating Indian self-determination contracts for fiscal year 1989. The new regulations shall be prepared with the active participation of Indian tribal governments and organizations. It is the intent of the Committee that the regulations currently contained in Title 41 of the Code of Federal Regulations, Section 14H–70, should be published in Title 25 of the Code of Federal Regulations, in a revised format consistent with these amendments. There are no programmatic reasons for having separate regulations for self-determination contracts with the Secretary of Health and Human Services in Title 42 of the Code of Federal Regulations. Therefore, a uniform and consistent set of regulations for all Indian self-determination contracts, including contracts with the Secretary of Health and Human Services, should be contained in Title 25 of the Code of Federal Regulations. The regulations regarding contracts under the Indian Self-Determination Act should be relatively simple, straightforward, and free of unnecessary requirements of procedures. The Committee expects the Secretary of the Interior and the Secretary of Health and Human Services to work closely with tribes in the initial drafting of these regulations, as well as in the subsequent refinement of proposed rules for publication. This section establishes a time-frame for promulgating regulations to implement the Act. The Committee intends for these amendments and regulations promulgated thereunder to become

effective prior to the beginning of the first Fiscal Year following enactment of this amendment.

Section 208. Reports.—Section 208 of the current law is redesignated as subsection 5(f) to consolidate and make consistent the reporting requirements. The Committee amendment reemphasizes the requirement to promulgate contract requirements consistent with the Administrative Procedures Act.

Section 209. Consolidated Contract Funding.—Section 209 of S. 1703 authorizes a demonstration project for consolidated funding for Indian tribes. Authority for consolidated funding contracts would expire three years after enactment of S. 1703. The authority to enter into a consolidated funding contract would only arise at the written request of a tribal governing body. The Committee intends for the arrangement between the Secretary of the Interior and a tribe would be a contractual one, to be embodied in a written agreement negotiated between the Secretary and the tribe requesting consolidated contract funding.

The amount of funding included in the consolidated contract would be at least the amount the tribe received from contracts under Public Law 93-638 with the Bureau of Indian Affairs (for all programs except ISEF). The amount of funding included in a consolidated funding contract would include funds provided for trust services for individual members of a tribe only to the extent that the tribe agreed to maintain trust services for its members.

A consolidated funding contract would be subject to other provisions on the Indian Self-Determination Act. Specifically, the tribe would submit a consolidated funding contract proposal to the Secretary for review. The Secretary then would review the proposal and approve it according to the declination criteria set forth in section 102 of the Act.

Furthermore, any disputes would be resolved by review in the United States District Court or, if claims for money damages and at the election of the tribe, in the U.S. Court of Claims. A tribe receiving funding pursuant to this section would be able to retrocede the contract and resume its eligibility for self-determination contracts pursuant to section 102. Any individual who willfully misapplies, steals, or obtains by fraud any money received by a tribe pursuant to a consolidated funding contract would of course be subject to criminal prosecution pursuant to section 6 of the Self-Determination Act.

Finally, the Committee amendment does not obligate any tribe receiving funding under section 209 to provide the same services and benefits as the Secretary would otherwise have provided. Likewise, the Secretary of the Interior is not obligated under the Committee amendment to provide services or benefits to a tribe or its members to the extent that funding is provided for such services or benefits to the tribe pursuant to section 209 of the Committee amendment. This provision is intended to allow a tribe maximum flexibility to use Federal funds to fashion programs for its members. It is not intended, as section 210 of the Committee amendment and section 111 of the Self-Determination Act make clear, to authorize or require the termination in any way of the existing trust responsibility of the United States with respect to Indian people.

CONCLUSION

As discussed earlier in this report, the Committee amendment is intended to facilitate the exercise by the Secretary of the trust responsibility in a manner that emphasizes cooperation with Indian tribes. For too long, the question of trust responsibility has been approached as an either/or proposition: either tribes have no freedom at all, or else the Federal Government has no responsibility. The correct approach to trust responsibility lies somewhere between these extremes, with the Federal Government responding positively to the conditions and capabilities of individual tribes. These amendments strengthen the ability of tribes to contract with the Secretary to perform trust-related functions, and to participate with the Secretary in trust responsibility decision-making as equal partners.

COST AND BUDGETARY CONSIDERATIONS

The cost estimates for S. 1703 as provided by the Congressional Budget Office are outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 2, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1703, the Indian Self-Determination and Education Assistance Act Amendments of 1987, as ordered reported by the Senate Select Committee on Indian Affairs on October 30, 1987. Enactment of this bill would increase costs to the federal government, but the magnitude of the increase cannot be estimated. Additional funding, however, would require appropriations. CBO expects that the budgets of state and local governments would not be affected by enactment of this legislation.

S. 1703 would make several changes to the Indian Self-Determination and Education Assistance Act of 1975, which allowed tribes to contract to administer Indian programs previously run by the federal government. Section 201 of the bill would require the Secretary of the Interior or the Secretary of Health and Human Services (HHS) to obtain liability insurance for tribes contracting with the federal government. Under current law, tribes must obtain their own liability insurance and the federal government may pay for it as an indirect cost component of administrative contract agreements. The federal share of tribal insurance costs, however, is unknown. To the extent that such insurance currently is not being paid for by the federal government, this provision would result in additional cost to the federal government.

The bill states that if the Secretary is unable to obtain liability insurance, tribal organizations having contracts would be covered under the Federal Tort Claims Act. The Federal Tort Claims Act protects employees of the federal government by providing that only the federal government can be sued for damages resulting from the performance of a federal employee. If these tribal organi-

zations were covered under the Federal Tort Claims Act, the federal government would not actually have to purchase insurance for the tribes. Rather, the provision would increase the federal government's liability and costs would be incurred only if suit were brought against the federal government. CBO has no basis to estimate the additional liability that would be taken on by the federal government or the additional cost that could be incurred by the Justice Department for defending more liability cases.

Section 201 also would expand the services for which tribal organizations could contract outside of the Departments of HHS and Interior. There is no basis to estimate the effect on the overall level of contracting and total contracting dollars that might be requested as a result of this expansion.

Section 202 of the bill would provide a broader range of technical assistance to tribes contracting with the federal government. Complete data currently is not collected on funding for technical assistance to tribes. Last year, the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) spent at least a total of $7 million for technical assistance. This figure includes grants to tribes for assistance, but does not include the cost of much of the federal agency staff time involved. Providing a broader range of assistance to tribes would increase costs. If the funding level were to double as a result of this provision, cost would be at least $14 million per year.

Section 203 of the bill would make changes in the treatment of certain federal personnel employed by tribal organizations. Under this bill, employees who leave federal service and work for tribal organizations would be allowed to retain benefits under the Federal Employees' Retirement System (FERS). As the bill is currently written, employees participating in FERS also would receive an additional benefit as the language would allow sick leave to be credited toward retirement. This benefit is not available to other FERS employees in the federal government. CBO expects no significant additional cost to the federal government would result through 1992 as a result of enactment of these personnel provisions.

The bill would provide severance pay and cash bonuses to certain employees whose positions are terminated because of a contract agreement. The amount of the cash bonus is not specified in the bill. Some 100 Intergovernmental Personnel Act (IPA) employees working for the IHS and the BIA were terminated in the last year. The number of terminations resulting from changing contract agreements is unknown, but is estimated to be a small subset of the total. Costs to the federal government of paying these employees some severance pay and cash bonuses is expected to be less than $1 million annually.

Section 205 of the bill would clarify congressional intent that contract support costs, or indirect costs, should be provided to tribes under administrative contract agreements. This section also would require the Secretary of HHS and the Secretary of the Interior to request separately funds for contract support costs. Although it is clearly the Committee's intent that additional appropriations be provided for indirect costs, section 205 provides no authority for additional appropriations. Under current law and through regulations, both the Indian Health Service and the

Bureau of Indian Affairs already have the authority to fund direct and indirect costs incurred by tribes. There is currently no maximum to the amount that can be provided to tribes under contract. CBO expects that this provision would result in no additional cost to the federal government. S. 1703 contains language stating that tribes are "entitled to contract" for programs. Because IHS and BIA activities are discretionary and must be funded through subsequent appropriations action, this language could have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS and BIA.

Section 209 of the bill would create a three-year demonstration project in which tribal organizations could provide services not currently provided by the federal government. As many as ten tribal organizations would be given at least as much funding as they would have received through the contracting process to provide services. If the ten tribes chosen are among tribes currently contracting with the federal government, this funding simply would substitute for current funding and result in no additional cost. If, on the other hand, the demonstration includes new tribes and services, or if the funding provided is greater than the tribe would otherwise have received under the contracting process, costs to the federal government would increase. If ten new tribes were provided with $500,000 in each of the three years, costs would be $5 million in each fiscal year 1988 through 1990.

All other sections of the bill are expected to result in no significant additional cost to the federal government or to state and local governments.

Please call me or have your staff contact Carmela Dyer if you have further questions.

With best wishes,

Sincerely,

ROBERT F. HALE
(For Edward M. Gramlich, Acting Director).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the provisions of the bill.

The Committee believes that S. 1703 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee requested a legislative report on S. 1703 from the Department of the Interior and the Department of Health and Human Services. The Committee has not received a legislative report on S. 1703 from the Department of the Interior or the Department of Health and Human Services. Therefore, the Committee has inserted in lieu of a legislative report the testimony on S. 1703 provided by the Department of the Interior and the Department of Health Services at the Committee hearing on October 2, 1987. The Committee has also included a letter from the Department of Justice regarding S. 1703.

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987"—OCTOBER 2, 1987

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

We could only support S. 1703 if it were amended to address our concerns as detailed in this testimony. We plan to submit an alternative proposal for amending the act in the near future.

Before dealing with some of the specifics involved in tribal-BIA contracting I believe it is appropriate to step back for a moment to consider what we wish to accomplish. The enactment of the Indian Self-Determination Act in January of 1975 was the end result of President Nixon's July 1970 Message to the Congress on Indian Policy which called for tribes to be given the opportunity to assume responsibilities and control over programs operated for their benefit by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS).

We now find ourselves in what sometimes seems to be a guagmire of conflicting laws, rules, regulations and policies trying to carry out what was a fairly straight forward and clear objective in President Nixon's Message, that is to transfer responsibility and funds at the tribes request to operate federally funded programs intended for their benefit.

Most of the problems are associated with the mechanism used in providing the tribes with the Federal funds. Apparently, in response to concerns that the turn over of programs and services to tribes could be followed by a cut off of the Federal funding, contracts were chosen as the mechanism for those turnovers. The reasoning apparently was that contracts are used in connection with a Federal agency's carrying out a Federal responsibility while grant agreements are associated with Federal aid in carrying out someone else's responsibilities and cooperative agreements are used in jointly carrying out a responsibility. Therefore, it apparently seemed to follow that the use of contracts provides a basis, or an additional basis, for continued Federal funding because it is clearer that Federal responsibilities are being carried out.

I do not believe that the use of the term "contract" provides any assurance against budget cuts or any guarantee of continued funding. It is notable that in the budgeting and appropriations process for BIA, no distinctions are made between contracted and non-contracted funds, nor is special consideration given to the degree to which a given program is contracted. However, the use of the contract mechanism has unintentionally caused the development of problems. Among the problems at least partially due to the contracting mechanism are the unproductive and time consuming annual renewal or recontracting process and the delays in the determination of contract amounts while final appropriation amounts are being determined and allocated in accordance with Appropriations and Conference Committee Reports.

Another problem is the BIA's need to monitor the contractor while the contract is being carried out because of the BIA's continuing responsibility to ensure compliance with detailed contract terms. To be able to do this the BIA may retain part of the budgeted funds for program operations that might otherwise be included in the contract amount.

Still another problem is indirect cost determinations, budgeting and funding for indirect costs, and the spiral of debt that can afflict tribes due to theoretical overrecoveries of costs. This problem is further complicated by tribal governments' dependence on the use of indirect cost funding to support more of a tribal government's expenses than the expenses the tribe incurs solely because of the contract.

One way of trying to deal with these problems is to continue to try to modify the Federal contracting mechanism to streamline it and make it more in line with the purpose intended. This is what S. 1703 is intended to do, and the attachment to my prepared statement provides our detailed comments on that bill. However, it is increasingly obvious that contracting is too unwieldy to promote true self-determination. For this reason I believe that a more basic change may be needed and that the time is appropriate to actively consider it. We are currently developing an extensive legislative proposal to fix what we view as the problems with Public Law 93–638. We plan to submit our proposal to the Congress within the next six weeks. We respectfully request that the Committee withhold action on S. 1703 until it has the chance to review our proposal.

I realize that a basic restructuring of Public Law 93–638 would be a tremendous undertaking, with actual implementation requiring several years, but I am convinced that our experience makes it clear that we have created too many barriers to true self-determination by relying on the mechanism of contracting. There must be incentives for tribal governments to run their own programs and for the BIA to transfer the programs through a sensible and manageable system. I do not believe that a few amendments to the existing law will solve the problems; it is time to consider a new process. We would be pleased to work with the Committee in consultation with Indian tribes, to develop legislative provisions along the lines I have outlined we will be proposing.

This concludes my prepared statement and I will be pleased to respond to the Committee's questions.

DEPARTMENT OF THE INTERIOR DETAILED COMMENTS ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987"

1. We have no comments on section 101 of S. 1703 which provides the short title and a table of contents for the bill.

2. Section 102 modifies the declaration of policy now in section 3(b) (25 U.S.C. 450a(b)) of the Indian Self-Determination and Education Assistance Act (hereinafter referred to as "the Act") to clarify that the Federal responsibility is to "individual Indian tribes and to the Indian people as a whole" rather than to "the Indian people". It also adds "In accordance with this policy the United

States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." We have no objections.

3. Section 103 amends section 4 (25 U.S.C. 450b) of the Act to add eight definitions and change a definition.

The term "construction programs" is added and defined to mean "programs for the planning, design, construction, repair, improvement and expansion of buildings or facilities but not limited to, housing, sanitation, roads, schools, administration and facilities, irrigation and agricultural works and water conservation, flood control, or port facilities".

(a) The word "including" is apparently missing after "facilities" the first time it appears (page 3, line 13).

(b) The definition apparently extends to activities usually considered as operation and maintenance of facilities as distinguished from true construction and renovation. We believe that the ongoing operation and maintenance of facilities is and should be contractible under the Act.

(c) The definition is included because of a later amendment (page 7, line 2) to section 102 of the Act to expressly include "construction programs" as contractible under the Act. Although we support the concept of allowing tribes to contract for the planning, design, and construction of projects, we believe such contracting should be done as a business activity so the tribe could make a profit and manage the contract appropriately. Contracting for construction under Public Law 93–638 is really not appropriate since it is designed to enable tribes to operate on-going programs whereas construction projects for a given tribe are infrequent and limited in duration. Moreover, contracting construction under Public Law 93–638 with all the attendant complexities of indirect cost-negotiation and payment would inevitably result in cost inflation. This inflation would reduce the amount of construction that could be done to benefit Indian people.

4. Sections 103 also amends section 4 of the Act to provide definitions for the terms "contract costs", "contract funding base", "direct program costs", "indirect costs", and "indirect cost rate". These terms are dealt with in connection with the sections where the terms are use.

5. Section 103 also amends section 4 of the Act to define the term "mature contract" (page 4, line 19) to mean "a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there has been no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organization".

This definition includes the first two of several uses in the bill of the phrase "Indian tribe or tribal organization". Section 4(c) (25 U.S.C. 450b(c)) defines the term "tribal organization" to include "the recognized governing body of any Indian tribe". Therefore, the phrase "Indian tribe or tribal organization" is redundant and the term "Indian tribe" need not be added when the term "tribal organization" is used. See also page 5, line 13; page 6, line 24; page 7, line 1; page 8, lines 1, 14 and 18; page 9, lines 1, 2, 4, and 9; page 11, lines 6 and 11; page 12, line 20; page 13, lines 8, 13, 15, and 21;

page 14, lines 3, 11, and 13; page 15, line 2; page 16, lines 16 and 23; page 17, lines 2, 7, 15, and 24; page 18, lines 4 and 24; and page 20, line 17.

6. Section 103 changes the definition of "Secretary" in section 4 of the Act to read "unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both". For clarity we recommend that the definition read as follows: " 'Secretary' unless otherwise designated, means the Secretary of Health and Human Services or the Secretary of the Interior, as appropriate in the context". This will avoid the possibility of questions as to whether the consolidated section 102 of the Act in section 201 of the bill can be interpreted as requiring one Secretary to contract with a tribal organization for the operation of an activity assigned by law to the other Secretary.

On page 5, line 4 word "it" should be inserted before "as".

7. Section 103 also amends section 4 of the Act by adding a definition of the term "self-determination contract" to mean "an intergovernmental contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided,* That no intergovernmental contract shall be construed to be a procurement contract".

(a) The definition uses the new and undefined term "intergovernmental contract" and the term is not used elsewhere in the bill. Under the Act as it now stands and as it would be amended by S. 1703, contract are to be entered into with "tribal organizations" which is defined to include other than governmental organizations including apparently even urban Indian organizations (see page 10, line 15 of the bill). Therefore the term "intergovernmental contract" is not appropriate unless the bill is amended as we recommend to limit contracting under the Act to tribal governments but permitting them to subcontract if they so choose. If that recommendation is accepted, the term "intergovernmental contract" or "intergovernmental self-determination contract" might be substituted for "self-determination contract".

(b) The definition refers to entering into contracts with "an agency of the United States" whereas under the Act and under S. 1703 the contracts are limited to those entered into by the "Secretary". We recommend that the definition be amended to conform to the authority in the Act.

(c) We strongly support the idea in the proviso that contracts under the Act are not procurement contracts, although we note that the proviso does not change the fact that retaining the contracting mechanism still requires funding with numerous strings attached.

8. Section 104 amends section 5 (25 U.S.C. 450c) of the Act to require the appropriate Secretary to have regulations for contract reporting requirements. Mature contracts (multi-year contracts) shall only be required to provide quarterly financial statements, an annual single-agency audit, and a brief program report.

We do not object to having regulations for contract reporting requirements and we strongly support minimizing reporting require-

ments. We note that the citation to the APA provision should be to section 553 of title 5, United States Code.

9. (a) Section 201 of S. 1703 restates section 102 of the Act by consolidating into one section the authority now in sections 102 (BIA) and 103 (IHS) (25 U.S.C. 450f and g). We have no objection to the consolidation of the section 102 and 103 provisions if the clarifying amendment in item 6 above to the definition of "Secretary" is made.

(b) We strongly object to the extension to "tribal organizations" of the right to require the Secretary to enter into a contract. (See page 6, line 24 and page 8, line 1.) This is a serious and counter productive weakening of tribal government authority. Under the Act as it now stands that right is reserved to Indian tribes acting through their tribal governments. Under the Act tribal governments determine which tribal organizations are to enter into the requested contracts with the Secretary. As we have indicated before, we believe that it is essential that the tribal governments have the authority and responsibility for the programs and services that are contracted or otherwise transferred from direct Federal operation. Otherwise, we risk confusion of roles and duplication of services.

(c) As amended by section 201, section 102(a)(1) otherwise tracks existing law providing for contracting to plan, conduct, and administer programs (or portions thereof) under the Johnson-O'Malley Act of 1934, the Snyder Act of 1921 "and any Act subsequent thereto", and the Indian Health Transfer Act of 1954 and adds express authority (which we have assumed existed under the Act) for contracting programs administered by the "Secretary" for which appropriations are made to other Federal agencies. It also expressly extends the Act to "any program, or portion thereof, for the benefit of Indians without regard to the agency or office of * * * the Department of the Interior within which it is performed." We have no objection to this extension. However, the provision includes authority for construction contracting and, as indicated in item 3(c) above, we strongly recommend that such contracting be authorized instead under the Buy Indian Act.

(d)(1) The amended section 102(a)(2) requires the Secretary to accept a "proposal" for a contract within 90 days of receipt unless the Secretary makes one of three findings. The three findings are the same as the three current declination criteria under the Act. We assume the "proposal" is the same as the "request" under section 102(a)(1). If so, the same term should be used in both instances. If not, the provisions should be clarified to indicate the relationship of a proposal to a request. We do not object to the 90 day requirement.

(2) The amended section 102(a)(2) omits the factors to be considered in arriving at a finding, i.e., whether there would be a deficiency in performance with respect to equipment, bookkeeping and accounting procedures, substantive knowledge of the program to be contracted, community support for the contract, adequately trained personnel, or other necessary components of contract performance. We have no objection to omitting these factors to be considered because we believe that the allowable finding provide adequate protections against improvident contracts. However, we do recommend

that an additional finding be added to clarify that requested contracts are subject to the availability of funds for the program or portion thereof involved and that the Secretary is not required to divert funds from BIA operated programs or portions thereof serving other Indians to funds the requested contract.

(f) Section 102(a)(3) on page 8, line 14 appears to be an unnecessary restatement of section 102(a)(1).

(g) We have no objection to the section 102(a)(4) provision allowing the consolidation of two or more mature contracts into a single contract.

(h)(1) Section 102(b) is based on the current section 102(b) of the Act except that it imposes a sixty day maximum period for action. It apparently allows the Secretary sixty days to notify a tribe of the reason for the Secretary declining to enter into a contact requested under section 102(a). The sixty days would seem to start running on the date the Secretary declines during the new limit of ninety days allowed in section 102(a)(2) described above.

(2) Also within that sixty days the Secretary is to provide assistance to the tribe to overcome the reasons for the declination. The ability to provide the assistance depends on the nature of the declination reason and the availability of appropriations to provide the assistance. We assume that it is not intended that our authority to provide the assistance expires at the end of the sixty days and we suggest that the provision be amended to require the initiation of assistance during the period.

(3) Finally, within the sixty days the Secretary is also to provide the tribe with a hearing and an opportunity for an appeal.

(i) The amended section 102(c)(1) on page 9, line 8 restates the current authority (see 25 U.S.C. 450f(c)) the Secretary has to require contracting tribes to carry liability insurance. It however modifies the current prohibition against an insurance carrier raising the tribe's defense of sovereign immunity to the extent of the insurance coverage by permitting the defense to be raised "for liability for interest prior to judgment or for punitive damages". We have no objection to this provision.

(j) We object to the Federal Tort Claims coverage under section 102(c)(2) of the bill, and defer to the Department of Justice to present the rationale.

10. Section 202 (Technical Assistance and Grants to Tribal Organizations) of the bill adds a new subsection (d) to the current section 104 (25 U.S.C. 450h) of the Act. The new provision requires the Secretary, on a non-reimbursable basis, to provide technical assistance to tribes and tribal organizations to develop and modify proposals to contract a program. Although we have no objections to this requirement we suggest it be clarified to state that it is subject to the availability of appropriations.

11. Section 203 (Personnel) amends the current section 105(e) (25 U.S.C. 450i(a)) of the Act to make permanent the authority to allow Federal employees who transfer to tribal employment to retain civil service benefits if the employee and the tribe so elect and the tribe agrees to pay the employers share of the costs of those benefits. While a reasonable extension of current law would not be objectionable we believe that it would be unwarranted to make this provision permanent at this time.

12. (a) Section 204 (Administrative Provisions) the current section 106(a) (25 U.S.C. 450j(a)) of the Act to exempt contracts under Public Law 93-638 from the Federal procurement law and Federal acquisition regulations. We strongly support such a provision. These contracts *are not* intended to be Federal procurement contracts.

(b) Section 204 restates the current section 106(c) (25 U.S.C. 450j(c)) to allow the use of multi-year contracts for 3 years in the case of new contracts and up to five years for mature conracts "unless the appropriate Secretary determines that a longer term would be advisable". As under current law, the amounts of the contracts would be subject to the availability of appropriations and could be renegotiated annually to reflect unforeseen circumstances. We support the idea of multi-year contracts.

(c) Section 204 also restates section 106(d) (25 U.S.C. 450j(d)) of the Act. The restatement omits our authority to amend contracts to increase amounts payable without having to find an increased benefit to the Federal Government. It also changes maximum period for the acceptance by the Secretary of a retrocession from 120 days to one year. We oppose the first of these changes because it may prevent us from providing necessary aid to a tribal contactor under the Act. We support the latter change because we need adequate time to budget and provide staff to take over a tribally run program. The one year lead time would allow for a more efficient transfer.

(d) Section 204 restates current section 106(e) (25 U.S.C. 450j(e)) to provide the Secretary authority to transfer title of excess Federal property and to acquire excess Federal property for donation if it can be used for a purpose for which a contract is authorized under the Act. We support this provision but recommend that the Act be further amended to require a tribe to return property used in connection with a program or portion thereof which the tribe retrocede to the Secretary or in case of a recession of the contract under section 109 (25 U.S.C. 450m) of the Act unless the Secretary declines the return of the property.

13. (a) Section 205 (Contract Funding and Indirect Costs) adds a new section 106 to the Act (the old section 106 having been redesignated as section 105) which incorporates the current section 106(h) (25 U.S.C. 450j(h) of the Act and new provisions. It requires the Secretary to provide funds for all "contract costs" incurred in connection with the contract but shall not be less than the Secretary would have provided for the Secretary's operation of the program. Any savings may be used for additional services under the contract. Funds provided for such contracts cannot be reduced (1) to provide funds for new contracts under the Act, (2) to provide funds for costs of the Federal agency including those for contract monitoring, ADP, technical assistance, or personnel costs such as costs for Federal employees displaced by the contract.

Under Section 106 (a)(5), funding could not be reduced unless there is a reduction in Congressional appropriations from the previous fiscal year for programs to be contracted. This provision would not be cost effective, as many programs are funded under the Indian Priority System (IPS), which is a budget line composed of numerous increases and decreases based upon tribal decisions.

Although the IPS portion of the budget may not show an overall decrease, many decreases may be included in instances where tribes have assigned a lower priority to programs and reduced funding accordingly. Under this provision of the proposed legislation, however, the Bureau would be required to maintain the same level of funding in such cases. Also, in some programs, in which tribal projects have been completed (such as facilities improvement and repair projects or minerals inventory surveys) additional funds should not be provided to the tribe, regardless of the amount of the appropriation. Given these circumstances, we must object to this provision.

We agree with the provision of not providing contract money for BIA monitoring of the contracts if we read the this to mean that the BIA should not be monitoring contracts. We believe we should be out of the day-to-day monitoring business and should be looking at a year end review to see if the services contracted for were provided. Tribes should be required to provide certification of their program audits and monthly financial reports showing expenditures. We do not believe a day-to-day monitoring of the contract is necessary for either the tribe or the BIA.

(b) Section 205 also requires in the new section 106(b) that the Secretary annually submit to the Congress detailed reports on the direct and indirect cost amounts provided and budgeted for contracts under the Act. The information required is not now compiled but could be in the future if we are allowed to proceed with our ADP and management information systems development. We would be pleased to work with the Committee's staff to develop a reporting requirement that we can comply with on a reasonable prompt basis without an undue diversion of resources from programs serving tribes and their members.

(c) Section 205 provides a new section 106(c) that holds tribes harmless for providing the difference in indirect cost rates actually provided and the amounts that would have been provided at 100 percent of their indirect cost rate in subsequent fiscal years for federal programs (other than BIA and IHS) that provide funding to the tribes.

Although we believe that tribes should be provided whatever indirect cost rate is provided to other contractors under various Federal programs and that those funds should be made available by the individual agencies, this issue is essentially one of what is referred to as "theoretical over-recovery". We do not believe that tribes should be penalized because of a theoretical over-recovery.

(d) Section 205 adds a new section 106(e) that requries the Secretary to give notice of any disallowance of costs within a year from receiving an audit report. An appeal plus hearing shall be provided. If notice is not given within one year, any right of action or other remedy relating to the disallowance is barred. We do not object to this provision but would like to work with the Committee's staff for clarification of exactly when the year begins.

(e) Section 205 adds a new section 106(f) that requires the Secretary to publish in the Federal Register a notice of intent to remove or alter any program in the Indian Priority System at least 90 days prior to removing or altering the program and to include a statement on the impact on funding levels for "each Agency and tribe

affected." This restriction would severely affect the Bureau's capability of making timely decisions which may be critical for the benefit of the tribes. For instance, removing the road maintenance program from the IPS will insure that roads are maintained consistently Bureau-wide, thereby meeting the standards required for obtaining badly needed Federal Highway Trust Fund dollars. The restrictions contained in this proposed bill will require the Bureau to undertake a long and cumbersome process in cases where timely decisions and flexibility is critical.

(f) Section 205 adds a new section 106(g) that requires the Secretary to add the indirect cost funding to the contract if requested by the tribal contractor. The combined amount shall be included in the contracting agency's budget. We would not object to a lump sum approach to determining appropriate contract support costs but disagree strongly with this provision.

Under Section 106 (g), contract support costs would in essense be "grandfathered" into the budget. This section provides that the indirect costs determined for tribal contracts would be added to the direct program funding amount and carried in the budget under the direct program line for each subsequent year the program remains contracted. The Bureau has implemented this method in the past, under Congressional direction, resulting in inequitable funding of these contract support costs from tribe to tribe.

14. (a) Section 206 (Contract Appeals) adds a new section 110(a) to the Act (the current section 110 being redesignated as section 111) that provides Federal district courts with original jurisdiction concurrent with the Court of Claims for claims arising under the Act or under contracts authorized by the Act. We recommend that the Committee's staff consult with the Department of Justice concerning this provision.

(b) Section 206 also adds a new section 110(b) prohibits the United States from unilaterally modifying contracts but also provides a means for doing so. We would be glad to work with the Committee's staff to clarify the intent of this provision.

(c) Section 206 also adds a new section 110(c) that provides for the Equal Access to Justice Act (the Act of October 1, 1980, 94 Stat. 2325) to apply to administrative appeals by Indian tribes and tribal organizations regarding Public Law 93-638 contracts. This would provide for the possible award of attorney fees in cases where the tribe prevails in the appeal. We object to this provision.

(d) Section 206 also adds a new section 110(d) that provides for the Contract Disputes Act to apply to Public Law 93-638 contracts. A recent court decision ruled that these contracts were not under the Contract Disputes Act. As stated above, if we do not view these contracts as procurement contracts, then they should not be subject to the Contract Disputes Act.

15. Section 207 (Savings Provisions) is the same as the current section 110 (25 U.S.C. 450n) of the Act. We have no objection to it.

16. Section 208 (Severability) is self explanatory. We have no objection to it.

STATEMENT BY EVERETT R. RHOADES, M.D., DIRECTOR, INDIAN HEALTH SERVICE, PUBLIC HEALTH SERVICE, ON S. 1703 THE INDIAN SELF-DETERMINATION AMENDMENTS OF 1987

Mr. Chairman and Members of the Committee: I am Dr. Everett R. Rhoades, and I am the Director of the Indian Health Service (IHS). I appreciate this opportunity to testify on S.1703, a bill to amend the Indian Self-Determinaton and Education Assistance Act of 1975 (Public Law 93-638). I am accompanied this morning by Mr. Douglas Sakiestewa, Director, Division of Grants and Procurement; Dr. Robert C. Birch, Acting Director, Division of Indian Resources Liaison; and Mr. Richard J. McCloskey, Director, Division of Legislation and Regulations.

IHS is the Federal agency charged with administering the principal health program for American Indians and Alaska Natives. At present, the IHS provides comprehensive health services to approximately 1,000,000 Indians and Alaska Native people. The goal of the IHS is to raise the health status of American Indian and Alaska Native people to the highest possible level. Its mission is threefold: (1) to provide or assure the availability of high quality comprehensive, accessible health services; (2) to provide increasing opportunities for Indians to manage and operate their own health programs; and, (3) to serve as a health advocate for Indian people.

Since the transfer of Indian health programs from the Department of the Interior to the Public Health Service in 1955, this comprehensive health delivery system has evolved into three modes of delivery. First, the direct health services delivery system, which is administered directly by IHS staff, provides services through the operation of 45 hospitals, 71 health centers, and several hundred smaller health stations and satellite clinics. The second mode is the tribal health delivery system, which is administered by tribes tribal organizations through contracts with the IHS, and which represents Indian self-determination.

These tribal organizations operate 6 hospitals and approximately 250 health clinics. As you know, the administration is implementing a comprehensive strategy for the next decade to expand opportunities for tribal operation of IHS hospitals and clinics. The third mode is the purchase of medical care by either IHS or tribes from providers serving the general population.

The primary method provided by Congress for the Indian people to exercise maximum participation in the management of these health systems is the Indian Self-Determination Act, Public Law 93-638. It provides tribes with an option to freely choose to either take over management of most Federal programs serving them or to retain Federal management of their programs. The tribes that choose not to take over management of their health programs from the IHS are not penalized for their decision. In our view, a tribal decision not to contract is equally an expression of Indian self-determination. In either case, a continuing Federal responsibility is required. These considerations are also consistent with our renewed commitment to advance self-determination in the operation of IHS hospitals and clinics.

In programs contracted to tribes under Public Law 93-638, the IHS continues its exercise of Federal responsibility for health care

by assuring achievement of objectives such as a high quality of care. The statutory option of a tribe to retrocede or the responsibility of the IHS to reassure programs where there are serious deficiencies, requires the IHS to maintain a continuing relationship with the tribal contractors and to maintain the capacity to reassume a program when either retrocession or rescission is utilized.

In addition, the IHS must maintain an appropriate structure and the resources to assure the delivery of the highest possible level of health care to tribes who choose not to contract for operation of IHS programs as well as to those who do.

I believe that the development of self-determination under Public Law 93-638 has been successful. This is not to say that it is either easy or without controversy or disagreements. That it is working is demonstrated by the fact that as of September 1987, IHS was administering 420 active Public Law 93-638 contracts. For fiscal year 1987, the Public Law 93-638 contract support provided by IHS is approximately $180 million for the Service Appropriation. For fiscal year 1987, Public Law 93-638 construction contracts, including fiscal year 1986 carryover, represents approximately $13 million of our construction appropriation as we work with tribal organizations on our new initiative, we expect to see these numbers grow rapidly in the coming years.

Tribal Health Program Management Costs

In the 12 years since the passage of Public Law 93-638, the IHS has made significant progress towards the IHS mission of providing increasing opportunities for tribes who choose to manage and operate their own health programs. When a tribe contracts a program under Public Law 93-638, tribal costs (both program and administrative) are funded from the total amount identified as available to IHS to support the contracted program.

Tribes, however, will have administrative costs over and above what it costs the IHS to administer the program at the service unit level. These can be referred to as tribal health program management costs. For example, the government is a self insurer, but if a tribe contracts an IHS function under Public Law 93-638, the tribe must purchase liability insurance (e.g. malpractice insurance). Tribes will also have other costs, e.g. legal services, additional data processing, financial management, personnel management, etc., all of which are allocable to the Public Law 93-638 contract program. In addition, we recognize that there are certain corporate costs which tribal contractors incur because of their operation of health programs, e.g. meetings of the health board, director's liability insurance, education and training of board members, and planning. These also must be accommodated. Collectively, these costs are often referred to as "indirect" costs. We believe that these justified costs should not be handled as "indirect" but as direct costs of self-determination, and we have devised resources allocation systems, described below, to do this.

In recognition of these additional administrative and executive direction costs, the House allowance for the fiscal year 1988 budget proposes an increase of $6,000,000 for "tribal contractor indirect costs short fall" and the Senate version calls for $3,000,000 for this

purpose. Both versions proposed to establish a $2.5 million Indian Self-Determination fund—as requested in the President's fiscal year 1988 budget—for the transitional costs of initial or expanded tribal contracts.

Allocation of Resources

As a result of 12 years' experience, the IHS and tribes have identified certain difficulties associated with the implementation of Public Law 93-638 and have, by working together, made significant progress in overcoming many of these difficulties. The IHS has aggressively pursued various administrative changes, and more are underway, to simplify and streamline the Public Law 93-638 contracting process and to ensure that resource allocation is both rational and equitable.

I would like to take this opportunity to tell you about some of these activities.

1. The IHS has carefully considered the information obtained in nearly 18 months of intensive tribal consultation including two pilot projects in which the Mississippi Band of Choctaw Indians and the Norton Sound Health Corporation helped in the initial development of improvements in resource allocation, two national IHS/tribal workshops (July 1986 in Reno and October 1986 in Tulsa) with nearly 300 participants in each, about 100 IHS/tribal meetings in the various IHS Areas, and a 120-day public comment period. As a result, the IHS issued its "Statement of Policy—Resource Allocation Methodology" on March 2, 1987. The IHS held a third national IHS/tribal workshop later that same month in Tulsa, referred to as Tulsa II, with about 400 participants, of which nearly 300 were Indian people. A major topic at the workshop was discussion of, and further orientation to, the Resource Allocation Methodology.

2. The purpose of the Statement of Policy is to establish a Resource Allocation Methodology (RAM) which the IHS will use to allocate its resources on a reasonable, rational, and equitable basis. The RAM will enable the IHS to evaluate IHS and tribally operated health programs on a relative scale according to need and performance to achieve a more rational and equitable distribution of IHS resources.

3. The IHS will use the RAM to:

   A. Allocate IHS resources reasonably, rationally, and equitably among IHS service programs. Our goal is to eliminate unreasonable disparities in service programs available to Indian people, and to promote efficient and effective use of resources appropriated for their health care.

   B. Assure that funding provided by IHS is determined on the same basis for both IHS and tribally operated health programs.

   C. Promote the IHS goal of raising the health status of Indian people to the highest possible level through improved management of resources.

4. The RAM consists of two related methodologies:

   A. The Area Resource Allocation Methodology (ARAM) for use by Headquarters to allocate IHS resources to the 12 Area

Offices. The Director, IHS will annually identify funds for distributions or redistribution by ARAM.

B. The Service Unit Resource Allocation Methodology (SURAM) for use by Area Offices to allocate their resources to IHS and tribally operated health programs with their respective Areas. Each Area Director will annually identify funds for distribution or redistribution by SURAM.

5. The IHS began its use of the RAM in allocating the FY 1987 Annual and Supplemental Appropriations. In estimating the funding level of Public Law 93-638 contracts for fiscal year 1988, the IHS will continue to work to refine the RAM as we learn from our experience with its application. In fact, five workgroups of IHS and tribal officials and currently involved is such efforts as a followup to the Tulsa II Workshop.

ADMINISTRATION OF PUBLIC LAW 93-638

The IHS is continuing its efforts to improve the Public Law 93-638 contracting process and to respond to what tribal officials have viewed as administrative restrictions and complex reporting requirements. As a major initial component of our self-determination initiative, we are working with other Departmental staff to identify all ingredients to self-determination and develop remedies. The Director of IHS and the Director of the Division of Grants and Procurement Management, Health Resources and Service Administration (HRSA) jointly issued on April 1, 1986, a memorandum to the IHS Area Directors describing proposed changes to "streamline" the Public Law 93-638 contracting process. This memorandum was shared with tribal officials and tribal Public Law 93-638 contractors for review and comment.

There has been further discussion among tribal, IHS, and HRSA officials of the proposed changes to improve the Public Law 93-638 contracting process and to revise the Sample Contract as a result of the IHS/tribal national workshop in Tulsa during October 1986. After considering the results of this intensive and continuing consultative process, the IHS issued, on March 6, 1987. Indian Self-Determination Memorandum (ISDM) 87-1 "Improvements in the Public Law 93-638 Contracting Process and Revision of the Public Law 93-638 Sample Contract Issued with ISDM 85-1".

The purpose of ISDM 87-1 is to describe the status of "simplification" of the Public Law 93-638 contracting process, and to revise the Sample Public Law 93-638 Cost Reimbursement Contract to further simplify Public Law 93-638 contract requirements.

Later, in March 1987, the IHS held the third national IHS/tribal workshop already described (Tulsa II). A major topic at the workshop was discussion and orientation to ISDM 87-1 which was followed by a workshop session in which IHS and tribal participants identified at least 36 additional recommendations and suggestions for further simplification of the Public Law 93-638 contracting process. A workgroup of IHS and tribal officials is currently working on these recommendations ans suggestions and will, as will the other four Tulsa II workgroups, provide me a final report of their conclusions and recommendations.

Based on recommendations made at the Tulsa II Workshop for development and communication of materials well in advance of these national workshops, our next national workshop is being planned during the Spring of 1988. This will provide sufficient time for IHS/tribal officials to work together in Area Workshops during the Winter of 1987-1988.

Another group of IHS and tribal officials is developing criteria for selecting among the three award instruments authorized in Public Law 93-638 contracts, grants, and cooperative agreements. A final report with recommendations will be submitted to me. The results will also be discussed at the next IHS/tribal national workshop.

The IHS and tribes have shown, especially over the past two years through these various Area meetings, national workshops, and day-to-day and other communications, that the tribal consultation process is both important to communication and understanding and essential to the effective conduct of a nationwide Indian health program respecting the principals of tribal sovereignty and the government-to-government relationship. Therefore, the IHS is working with tribal officials to develop an IHS policy on tribal consultation and will consider the information and concepts included in a recent policy paper on this subject developed by the National Indian Health Board.

The IHS is also studying the recommendations of the recent studies/reports on Indian Self-Determination activities developed by the National Indian Health Board, General Accounting Office, Office of Technology Assessment, and Public Health Service, as well as our own Descriptive Analysis of Tribal Health Page 10.

Programs in our continuing effort to establish a more positive environment for Indian Self-Determination in the IHS and to help Indian tribes succeed in their self-determination activities.

S. 1703

I would now like to turn to the specifics of S. 1703. The bill contains a number of provisions that are unclear but appear to be derived from concern with BIA procedures. Nevertheless, by the terms of the bill, these provisions would apply equally to IHS. Though I will mention at least one of these in what follows, they will be dealt with in a more detailed analysis of the bill which is underway. I would now like to discuss a number of major issues with S. 1703.

We applaud the goal to simplify and strengthen the self-determination process. As I have just mentioned, we have already undertaken numerous efforts to administratively do just that, consistent with our initiative for hospital and clinic operations. However, S. 1703 contains provisions that would hamper our efforts to equitably allocate resources, restrict IHS' management flexibility and provide unworkable and potentially harmful solutions to problems for which solutions have already been developed. For these reasons, we do not support the bill as currently drafted.

The first major issue concerns the various provisions which, when taken together, determine the level at which contracts must be funded. Section 4 of S. 1703 adds a definition of "Contract Costs"

which includes all direct and indirect costs "which are necessary and reasonable". Moreover, tribes and tribal organizations are (under proposed sec. 102(a)(3)) "entitled to contract" for an amount which "shall include all contract costs incurred," (proposed sec. 106(a)(1)) but "not less than * * * otherwise provided for direct operation of the programs * * *" (Proposed sec. 106(a)(4)). It is possible that these costs would be more than the IHS would have available for the program's direct operation.

Since the contractor is "entitled" to these costs, the IHS would be required to obtain the funds from elsewhere in the IHS system. The problem is compounded in that proposed sections 106(a)(2), (3), (5), (6) and (7) further "protects" tribal contractors' first year base funding (direct and indirect) from reduction in future years from anything other than a reduction in subsequent appropriations. This creates a "first come first served" system with the risk of fund reductions being borne by those tribes which have chosen not to contract.

These interrelated provisions, combined with the definitions proposed in section 4, appear to provide tribal contractors with an entitlement to all costs reflected in the contract, direct as well as indirect, and established as a funding base for future years whatever can be justified as "necessary and reasonable" in the first year without regard to what funds IHS would have spent on the program, changes in program needs, or efforts to equitably distribute IHS resources. Moreover, permitting the base funding of a contract to be reduced only when there is a reduction in the appropriation would preclude the use of the Resource Allocation Methodology (RAM) when appropriations are constant from one year to the next.

We would support changes in the bill that would allow a small reduction in contract funding to reflect reductions in program needs, or efforts to achieve equity among IHS service units. Such a change would allow IHS to pursue equitable distribution of funding while providing relative stability for contract funding. We would be willing to work with the Committee in devising language to that end.

As explained above, our allocation system takes into account Tribal Health Program Management costs in allocating funds on a reasonable, rational, and equitable basis between all IHS operated and contracted programs. The purpose of our allocation system is to fund such costs based upon comparable standards of need. We have been directed to do this by both the courts and the Congress including this Committee's own bill to extend the Indian Health Care Improvement Act (see section 201(i) of S. 129).

In the case of relatively constant appropriations, S. 1703 provisions would injure those tribes that choose not to contract by reducing the funds available for IHS direct services while 638 contracts are funded at the same level.

The court, in *Rincon Band of Mission Indians* v. *Harris*, 618 F.2d 569 (1980), ordered the IHS to develop a system to rationally allocate its funds, noting that:

> A system that allocates funds to programs merely because the programs received funds the previous year, re-

gardless of whether the programs are ineffective, unnecessary or obsolete is not rationally aimed at an equitable division of funds.

We are opposed to Section 205 of the bill which would institutionalize precisely the problem cited by the *Rincon* court by making the previous years' base funding automatically available for tribal contractors under Public Law 93-638, while placing at risk those tribes exercising their self-determination option to receive health services delivered by the IHS.

During a period of relatively constant annual appropriations, the overall effect of this bill would be to negate the RAM and prevent IHS from going forward with current attempts, with tribal consultation, to allocate resources on an equitable basis.

Another issue is the extension of Federal Tort Claims Act coverage. The Department opposes that part of Section 201 which would extend Federal Tort Claims Act coverage to Public Law 93-638 tribal contractors. Buy Indian contractors, and urban Indian organizations. This provision would have wide-ranging adverse ramifications as a precedent for other government contractors. Nevertheless, we are aware of and are equally concerned about the crisis in rising costs of medical malpractice insurance, a problem which is by no means unique to Indian contractors. In order to address this problem, this Department will seek additional funds in the development of next years' budget to specifically address tribal malpractice costs.

Section 201 also directs the Secretary to enter into contracts with tribes or tribal organizations. It is not clear what is intended by this language change. On its face it appears to open up a whole new category of self-determination contractors who are not tribes and who will not be required to get the approval of tribes.

Proposed section 106(g) which directs that the combined contract amount be carried in the contracting agency's budget at the specific budget location of the contracted program, appears directed at the Department of the Interior (DOI) budget procedures. The Department of Health and Human Services does not budget in the manner described. However, the provision would apply to both Departments.

We are also opposed to the provision in section 205 forgiving indebtedness of tribes who have failed to properly account for their funds. This is unfair to those tribes who have done their accounting and invoicing correctly and have incurred no such debts. It is also a disincentive for tribes to properly manage their programs. Existing cost principles are fair and adequate.

Mr. Chairman, that concludes my opening remarks. At this time I will be happy to answer my questions the Committee may have.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, October 27, 1987.

Hon. DANIEL K. INOUYE,
Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR SENATOR INOUYE: We recently have reviewed S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." We believe that the bill would set a highly undesirable precedent by having the United States accept responsibility for the tortious conduct of certain contractors of Indian tribes. We also are concerned that the proposed amendments do not adequately ensure tribal compliance with the Indian Civil Rights Act in the course of administering self-determination contracts. These issues are discussed in detail below.

Section 202(c)(2)(A) of S. 1703 provides that contract medical and dental personnel providing health services to the Indian tribes are to be considered employees of the Public Health Service for purposes of claims for personal injury or death arising out of the performance of duties which are within the scope of their employment agreements. In other words, under the provisions of the Federal Tort Claims Act (FTCA), the United States is to assume responsibility for the medical malpractice of certain physicians employed by contract with the Indian tribes.

Similar efforts to obtain protection from personal liability for Indian tribe contractors have been included in various pieces of legislation over the last few years. For example, H.R. 2712 and H.R. 1223 in the 100th Congress, and H.R. 5234 in the 99th Congress all would have achieved the same result as section 202(c)(2)(A) of S. 1703. Because of the broad-ranging adverse ramifications of this troublesome precedent, the Department of Justice consistently has opposed these efforts in the past. We are equally opposed to these provisions in S. 1703.

Under the FTCA, the United States accepts limited responsibility for the actions of those persons with whom it has a "master-servant" relationship, and over whom it can exert control, i.e., its employees. Neither of these relationships generally exists between the United States and its contractors. This is no less true with contractors who provide services, such as medical care, instead of goods. And in this case, the relationship is even more tenuous because the pertinent physicians are contractors of the Indian tribes, and not the United States.

The United States regularly relies upon the use of contract physicians. For example, both the Veterans Administration and the Department of Defense use contract physicians in order to fulfill their respective obligations to provide health care to current and former military members and their families. But physicians who merely contract with, but are not employees of, the United States remain individually responsible for their medical negligence. See *Lurch* v. *United States,* 719 F.2d 333 (10th Cir. 1983).

This is not mere happenstance. The FTCA excluded government contractors from the persons covered by its assumption of liability precisely because there generally was no ability to supervise or

control the day-to-day operations of such individuals. See *United States* v. *Orleans,* 425 U.S. 807 (1976); *Logue* v. *United States,* 412 U.S. 521 (1972). To relieve contractors from responsibility for their conduct without being able to control that conduct completely defeats the deterrent value of the fault-based tort compensation system. Such a course of conduct is both fiscally unwise and potentially counterproductive to improved health care among the Indian tribes.

It is our understanding that section 202(c)(1)(A) is designed to forestall a projected difficulty in obtaining qualified medical personnel to provide health services to the Indian tribes in the face of rising medical malpractice insurance premiums. But the crisis in medical malpractice insurance is by no means isolated. Health care professionals across the country, both public and private, recently have experienced exponential increases in their liability insurance premiums. Some have had their coverage canceled altogether. This is the inevitable result of a lottery-like liability climate which has produced skyrocketing average damage awards and an ever increasing number of malpractice lawsuits. We understand and are fully sympathetic to the frustration which this crisis has created in the medical community.

But numerous government contractors could make equally compelling arguments that their situations deserve the same special consideration which S. 1703 would provide to tribal organizations and the physicians with whom they contract. The crisis in affordable and available liability insurance has affected all manner of manufacturers and providers of goods and services. It would be highly inequitable to provide FTCA protection from liability to contractors with the Indian tribes while those who directly contract with the United States receive no similar assurance.

If anything, such a distinction runs directly counter to the fundamental concept of Indian self-determination. It is indeed paradoxical to endorse the notion that the Indian tribes should be self-governing and in control of their welfare, while at the same time paternalistically relieving them and their contractors of responsibility for their actions.

It should be noted that we are willing and ready to assist in achieving civil justice reform which would help solve the liability problems of these particular physicians. In that regard, last year the Administration submitted to the Congress a bill which would reform and limit the liability of federal government contractors. See The Government Contractor Liability Reform Act of 1986 (S. 2441, 99th Cong. 2d Sess.). The Department would support—and would be pleased to work with the Congress on—similar legislation for this particular class of Indian tribe contractors. We believe that such legislation would substantially defuse many of the insurance problems and liability concerns that have led to these indemnification requests.

Further, the proposed amendments fail to assure tribal compliance with the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 et seq. Recently, we have received a number of complaints alleging unfairness and discrimination in tribal programs funded through federal contracts or grants. The ICRA was enacted to limit tribes in many of the same ways as the Bill of Rights and the 14th Amend-

ment limit federal and state governments. Compliance is critical because the Constitution and many federal civil rights statutes do not apply to Indian tribes. See, e.g., *Talton* v. *Mayes,* 163 U.S. 376 (1896) (Since Indian tribes are neither federal instrumentalities nor subdivisions of states, they remain largely beyond the Constitution's scope).

Testimony before the Commission on Civil Rights, in hearings held recently in Flagstaff, Arizona, and Rapid City, South Dakota, provides substantial evidence of ICRA non-compliance on the part of tribes in administering federally-funded programs such as law enforcement and tribal courts. In addition, in a November 1984 Report, the Presidential Commission on Indian Reservation Economies found that "[a]ccess to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered unfair by many Indians." Id. at 36. Such criticism finds substantial support in federal court decisions. For example, in *Shortbull* v. *Looking Elk,* 677 F.2d 645, 650 (8th Cir. 1982), a panel of the Eight Circuit Court of Appeals noted that:

> because of [a specific tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act.

In order to assure full tribal compliance with the ICRA in all contracts or grants administered pursuant to this title, we suggest adding the following language to S. 1703:

> On page 20, between lines 23 and 24, add the following new Section 207, and renumber succeeding sections accordingly:
>
> "SEC. 207. Compliance with the Indian Civil Rights Act.
>
> "Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975 88 Stat. 2203, as amended) is further amended by adding the following new section 112:
>
> "SEC. 112. (a) Any program or activity receiving federal financial assistance from the Secretary of the Interior or from the Secretary of Health and Human Services pursuant to this Title shall be administered in compliance with the Indian Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968 82 Stat. 77).
>
> "(b) Federal district courts shall have jurisdiction of civil actions alleging the failure of programs or activities funded by this Act to comply with § 202 of Title II of the Civil Rights Act of 1968 (Public Law 90-284, Act of April 11, 1968, 82 Stat. 77).
>
> "(c) Any aggrieved person, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States,

> may initiate an action in the appropriate federal district court for equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with subparagraphs (a) and (b) above. Tribal sovereign immunity shall not constitute a defense to such an action."

While we continue to support the important policy goal of Indian self-determination, we find equally important the principles of fairness and equality which underlie the ICRA. See, e.g., *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978) ("[a] central purpose of the ICRA was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans' and thereby to 'protect individual Indians from the arbitrary and unjust action of tribal governments' ". Id. at 61, *quoting* S. Rept. No. 81, 90th Cong. 1st Sess., 5–6 (1967)). Without the additional language we suggest above, tribal programs administered with federal funds may not fully comply with the ICRA.

Several other provisions of S. 1703 also are troublesome. For example, section 206 would extend the coverage of the Contract Disputes Act to self-determination contracts. Whether this is desirable is subject to debate. Regardless of the wisdom of this decision, however, the Contract Disputes Act has specific provisions which govern the methods by which judicial review of a contracting officer's decision can be obtained. An adverse contracting officer's decision may be appealed to an agency Board of Contract Appeals (41 U.S.C. 606) and, thereafter, a dissatisfied contractor may seek further review in the United States Court of Appeals for the Federal Circuit (41 U.S.C. 607(g)). In the alternative, a disappointed contractor may challenge an adverse contracting officer's decision directly in the United States Claims Court (41 US.C. 609).

Under the Act, however, Federal district courts and the "Court of Claims" (sic) are given complete concurrent jurisdiction over any civil action arising under self-determination contracts. This raises an obvious internal inconsistency. It is also inconsistent with section 1346(a)(2), of title 28, which allows other than Contract Disputes Act contract claims to be pursued in the district court only when the amount in controversy is less than $10,000.

Also, section 206 makes the Equal Access to Justice Act (28 U.S.C. 2412(d)) applicable to administrative appeals in self-determination contract cases. Its not clear why this is necessary or what its effect would be. While the Contract Disputes Act has no independent provison for the award of attorney fees, persons who successfully challenge an adverse contracting officer's decision may already avail themselves of the Equal Access to Justices Act, assuming they otherwise meet the eligibility requirements (28 U.S.C. 2412(d)(2)(E)). As a result, this part of section 206 seems superfluous.

Based upon the foregoing, the Department must express its strong opposition to S. 1703 in its current form. The Office of Management and Budget has advised this Department that there is no

objection to the submission of this report from the standpoint of the Administration's program.

Sincerely.

JOHN R. BOLTON,
Assistant Attorney General.

ADDITIONAL VIEWS OF MR. EVANS

The Indian Self-Determination Act Amendments of 1987 represent a profound and thorough reexamination of one of the most important and successful pieces of legislation affecting Indian people in our Nation's history. Consequently, it is perfectly appropriate that the bill was developed with the active participation of tribal leaders from tribes throughout the country. These are the people who will implement this bill. They are the ones who will rejoice in its strengths. They are also the ones who will struggle with its weaknesses.

I know that tribal leaders generally are pleased with our effort. I am grateful to them for their efforts and for their confidence. I am also aware that many are concerned about a provision in the bill to allow, on a test basis, for tribes to consolidate funding they receive from the Bureau of Indian Affairs and to fashion programs these tribes believe are best suited for their members.

The essence of self-determination is that Indian tribes, as local governments, are in the best position to determine the needs of their constituents. Consolidated funding may represent the logical culmination of this policy. Indian tribal leaders should discuss consolidated funding thoroughly. If they determine that this process will not serve their needs any better than more conventional self-determination contracts or direct program services from the Bureau of Indian Affairs, they should not request a consolidated funding contract. Those who answer in the affirmative, however, should be given the opportunity to try. Their belief may be wrong. If so, the Act allows them to retrocede a consolidated funding contract as they can any other contract entered into under this Act. In any event, authority for consolidated contract funding expires three years after its enactment.

I look forward to working with tribal leaders and members of the Committee to develop improvements to this provision. Specifically, I believe consolidated contract funding should, if desired by a tribe, include the amount of funding provided for the benefit of such tribe and its members through programs operated directly by the Bureau of Indian Affairs. Furthermore, since some tribal leaders are concerned that they might be coerced into requesting a consolidated funding contract, the amendment should include by name only those tribes who believe they can negotiate a satisfactory agreement with the Secretary of the Interior. I believe the Committee also should consider specifying declination criteria similar to those contained in section 102 of the Self-Determination Act. Finally, I remain unconvinced that a limitation on the Secretary's obligation to provide services is any more necessary here than it is for other self-determination contracts.

These are just examples of changes that the Committee should consider before final passage of this Act. I urge those who are con-

cerned about this provision to work with the Committee to improve it. If it is not included in this bill, the consolidated funding concept is unlikely to be tested. The result will be that Indian tribes expressing a desire to fashion their own programs will not be allowed to do so. It will not be because they chose not to or because they failed in their efforts. Rather, it will be because they were never given an opportunity to try.

For many tribes, the Indian Self-Determination Act is of limited value. Some tribes are too small to administer their own programs. These tribes receive services from the Bureau of Indian Affairs through multi-tribe agencies. Two of these agencies, the Puget Sound Agency and the Olympic Peninsula Agency, are located in my home state of Washington.

Two tribes in western Washington, the Lummi Tribe and the Quinault Nation, are large enough and sophisticated enough to assume the administration of federal program which benefit their members. Yet services provided to them are shared with other smaller tribes in their respective agencies. Nevertheless, I believe they should be allowed to use federal money provided for the benefit of their members to fashion programs they determine are best suited for their needs. I am aware that, if they chose to do so, institutional adjustments will be needed to offset any negative impacts their decision may have on other tribes within the agencies that serve them. In any event, I remain committed to working with these tribes, and with their neighbors, to develop better ways for them to provide services to the Indian people they serve.

DANIEL J. EVANS.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1703 are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman:

PUBLIC LAW 93-638

To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Self-Determination and Education Assistance Act."

CONGRESSIONAL FINDINGS

SEC. 2. (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills cruical to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for an assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunites and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to *individual Indian tribes and to* the Indian people *as a whole* through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.*

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

DEFINITIONS

SEC. 4. For the purposes of this Act, the term—

(a) "construction programs" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities including but not limited to, housing, law enforcement and detention, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, and port facilities;

(b) "contract costs" means all direct program costs and indirect costs which are necessary and reasonable for the proper and efficient administration of self-determination contracts;

(c) "contract funding base" means the base level from which contract funding needs are determined, and includes all contract costs;

(d) "direct program costs" means costs that can be identified specifically with a particular contract objective;

(e)[a] "Indian" means a person who is a member of an Indian tribe;

(f)[b] "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native Village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by United States to Indians because of their status as Indians;

(g) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(h) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the cognizant Federal agency;

(i) "mature contract" means a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organizations: Provided, That a contract in existence on the date of enactment of this Act which meets this definition shall be considered to be a mature contract, upon the request of an Indian tribe;

(j)[e] "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

(k)[d] "Secretary", unless othewise designated, means *either* the *Secretary of Health and Human Services or the* Secretary of the Interior *or both*;

(l) "self-determination contract" means a contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to federal law: Provided, That no contract entered into pursuant to this Act shall be construed to be a procurement contract; and

(m)[f] "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, of, there is no such officer or agency, an officer or agency designated by the Governor or by State law.

REPORTING AND AUDIT REQUIREMENTS

SEC. 5. (a) Each recipient of Federal financial assistance from the Secretary of Interior or the Secretary of Health, Education, and Welfare, under this Act, shall keep such records as the appropriate Secretary shall prescribe, *by regulations promulgated under the Administrative Procedure Act (sections 552 and 553 of Title 5, United States Code),* including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an audit: *Provided, however, That for the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for federal funds, the annual single-agency audit required by the Single Audit Act of 1984 (Public Law 98-502, Act of*

October 19, 1984, 98 Stat. 2327, chapter 75 of title 31, United States Code), and a brief annual program report.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Any funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States.

(e) The Secretary shall report annually in writing to the tribes in each service area regarding projected and actual staffing levels, funding obligations and expenditures for programs operated directly by the Secretary in the respective service area.

PENALTIES

SEC. 6. Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than $10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more then one year, or both.

WAGE AND LABOR STANDARDS

SEC. 7. (a) All laborers and mechanics employed by contractors of subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to htis Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c).

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contacts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).

CARRYOVER OF FUNDS

SEC. 8. The provisions of any other laws to the contrary notwithstanding, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated [and] *or* expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation [and] *or* expenditure during such succeeding fiscal year. *If the funds are to be expended in the succeeding fiscal years for the purpose for which they were originally appropriated, contracted or granted, no additional justification or documentation of such purposes need be provided by the tribal organization to the agency as a condition of receiving or expending such funds.*

SEC. 9. The provisions of this Act shall not be subject to the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (Public Law 95–224; 92 Stat. 3): *Provided,* That a grant agreement or cooperative agreement may be utilized in lieu of a contract under sections 102 and 103 of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved.

TITLE I—INDIAN SELF-DETERMINATION ACT

SEC. 101. This title may be cited as the "Indian Self-Determination Act".

SELF-DETERMINATION CONTRACTS [BY THE SECRETARY OF THE INTERIOR]

[SEC. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization or any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any or all of his functions, authorities and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended, and any Act subsequent thereto: *Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be

rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further,* That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.]

SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe, by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs, including construction programs, or portions thereof—

(i) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act;

(ii) any program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) and any Act subsequent thereto;

(iii) any or all of the functions, authorities and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(iv) any program or portion thereof, including construction programs, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(v) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless a specific finding is made that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed project of function to be contracted for cannot be properly completed or maintained by the proposed contract.

(3) Indian tribes, and tribal organizations authorized by an Indian tribe under paragraph (1) of this subsection, shall be entitled to contract for any program or function operated by the Federal government for the benefit of such tribe, as provided in this section.

(4) Upon the request of any tribal organization that operates two or more mature self-determination contracts, the Secretary is author-

ized to allow tribal organization to consolidate such contracts into one single contract.

(b) Whenever the Secretary declines to enter into a *self-determination* contract or contracts pursuant to subsection (a) of this section, [he] *the Secretary* shall (1) state [his] *any* objections in writing to the *tribal organization* within sixty days *of receipt of the proposal,* (2) provide assistance to the tribal organization to overcome [his] *the* stated objections, and (3) provide the *tribal organization* with a hearing, under such rules and regulations as he *or she* may promulgate, and the opportunity for appeal on the objections raised.

[(e) The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.]

(c)(1) For purposes of chapter 171 and section 1346 of title 28, United States Code, a tribal organization carrying out a contract, grant agreement, or cooperative agreement under this section or section 104(b) shall be deemed to be a Federal Agency while carrying out such contract or agreement and its employees (including those acting on behalf of such tribal organization as provided in section 2671 of title 28) are deemed employees of the United States while acting within the scope of their employment in carrying out the contract or agreement.

(2) Subsection (c)(1) shall apply to an urban Indian organization, and to employees of an urban Indian organization, only with respect to services provided to Indians.".

[CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

[Sec. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended: *Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further,* That the Secretary of Health, Education, and Welfare, in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping

and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

[(b) Whenever the Secretary of Health, Education, and Welfare declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised.]

[(c) The Secretary of Health, Education, and Welfare is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.]

TECHNICAL ASSISTANCE AND GRANTS TO INDIAN TRIBAL ORGANIZATIONS

SEC. [104.] *103.* (a) The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 102 of this Act and the additional costs associated with the initial years of operation under such a contract or contracts; *or*

(3) the acquisition of land in connection with items (1) and (2) above: *Provided,* That in the case of land within reservation boundaries or which adjoins on at least two sides lands held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe. [or

[(4) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe.]

(b) The Secretary of Health, Education, and Welfare may, in accordance with regulations adopted pursuant to section 107 of this Act, make grants to any Indian tribe or tribal organization for—

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation, or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 of this Act.

(c) The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

(d) The Secretary is directed, upon the request of any tribal organization, to provide technical assistance on a nonreimbursable basis to such tribal organization—

(1) to develop any new self-determination contract authorized pursuant to this Act;

(2) to provide for the assumption by such tribal organization of any program, or portion thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto; or

(3) to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve pursuant to section 102 of this Act.

(e) The Secretary is authorized, upon the request of an Indian tribe, to contract with or make a grant to any tribal organization for—

(1) obtaining technical assistance from providers designated by the tribal organization, including tribal organizations that operate mature contracts, for the purposes of program planning and evaluation, including the development of any management systems necessary for contract management, and the development of cost allocation plans for indirect cost rates; and

(2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including federal administrative functions.

PERSONNEL

SEC. [105.] *104.* (a) Section 3371(2) of chapter 33 of title 5, United States Code, is amended (1) by deleting the word "and" immediately after the semicolon in clause (A); (2) by deleting the period at the end of clause (B) and inserting in lieu thereof a semicolon and the word "and"; and (3) by adding at the end thereof the following new clause:

"(C) any Indian tribe, band, nation, or other organized group or community, including any Alaska Native Village as defined in the Alaska Native Claims Settlement Act (85 Stat. 688),

which is recognized as eligible for the special programs and services provided by United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4(c) of the Indian Self-Determination and Education Assistance Act.".

(b) The Act of August 5, 1954 (68 Stat. 674), as amended, is further amended by adding a new section 8 after section 7 of the Act, as follows:

"SEC. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, upon the request of any Indian tribe, band, group, or community, commissioned officers of the Service may be assigned by the Secretary for the purpose of carrying out the provisions of contracts with, or grants to, tribal organizations pursuant to section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act.".

(c) Paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words "Environmental Science Services Administration" the words "or who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended".

(d) Section 502 of the Intergovernmental Personnel Act of 1970 (84 Stat. 1909, 1925) is amended—

(1) by deleting the word "and" after paragraph (3);

(2) by deleting the period after paragraph (4) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new paragraph:

"(5) Notwithstanding the populations requirements of section 203(a) and 303(c) of this Act, a 'local government' and a 'general local government' also mean the recognized governing body of an Idian tribe, band, pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which performs substantial governmental functions. The requirements of section 203(c) and 203(d) of this Act, relating to reviews by the Governor of a State, do not apply to grant applications from the governing body of an Indian tribe, although nothing in this Act is intended to discourage or prohibit voluntary communications and cooperation between Indian tribes and State and local governments."

(e) Notwithstanding any other law, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization [on or before December 31, 1988], in connection with govenmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

(1) to retain coverage, rights, and benefits under subchapter I of chapter 81 ("Compensation for Work Injuries") of title 5, United States Code, and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization

any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of chapter 81 of title 5, United States Code, as follows:

(A) payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and

(B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.

(2) to retain coverage, rights, and benefits under chapter 83 ("Retirement") *or chapter 84 ("Federal Employees' Retirement System")* of title 5, United States Code, if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (section 8348 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under section 8332 of title 5, United States Code. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.

(3) To retain coverage, rights, and benefits under chapter 89 ("Health Insurance") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (section 8909 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 89 of title 5, United States Code.

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (section 8714 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 87 of title 5, United States Code.

(f) During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), (4) of such preceding subsection.

(g) An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall

make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform services in activities of the type described in such subsection.

(h) For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in section 2105 of title 5, United States Code.

(i) The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

(j) Anything in sections 205 and 207 of title 18, United States Code to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. 48) and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection with any matter pending before my department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: *Provided,* That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial movement he may have had as an officer or employee of the United States in connection with the matter involved.

(k) Section 3372(a) of title 5, United States Code, is further amended to add the following to the end thereof:

"If the assigned employee fails to complete the period of assignment, and there is another employee willing and available to do so, the Secretary may assign the employee to complete the period of assignment, and may execute an agreement with the tribal organization with respect to the replacement employee. That agreement may provide for a different period of agreement and such other modifications to the original agreement as may be agreed to by the Secretary and the tribal organization.".

(l) Section 402 of the Intergovernmental Personnel Act of 1970, as amended (42 U.S.C.A. 3372) is further amended by adding a new subsection (d) as follows:

"(d) Where the employee is assigned to a tribal organization, the employee shall be eligible for periodic step-increases, additional step-increases, merit pay, and cash awards, as defined in Chapters 53 and 54 of this Title, on the same basis as other federal employees.

(m) An Indian appointed to the Federal service under an excepted appointment under the authority of section 12 of the Act of June 18, 1934, or any other provision of law granting a preference to Indians in personnel actions, shall be converted to a career appointment in the competitive service after three years of service and satisfactory performance. The conversion does not alter the Indian's eligibility for preference in personnel actions.

(n) From funds not budgeted or earmarked for direct services or benefits to Indians or for contracts or grants to tribal organizations, the Secretary shall provide a one-time only payment to an employee of the Secretary of an amount equal to one-half of the annual salary rate of the employee if the employee's position is terminated because of a contract or agreement under this Act and the employee is not offered another position of at least equal grade and pay and is either separated from employment by the Secretary, or is transferred to a position at a lower grade and headquartered more than 50 miles from the headquarters of the employee's terminated position. Such payment shall be in addition to any other payments or benefits the employee is entitled to under any other law or regulation. This subsection applies only to contracts or agreements executed after its enactment.

(o) In addition to payments made pursuant to subsection (n), from funds not budgeted or earmarked for direct services or benefits to Indians or for contracts or grants to tribal organizations, the Secretary is authorized to pay cash bonuses to the employees of the Secretary whose positions are terminated because of a contract or agreement under this Act or who made a contribution to the successful contracting with the tribal organization. This subsection applies only to contracts and agreements executed after its enactment.

ADMINSTRATIVE PROVISIONS

SEC. [106.] *105.* (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertisting and need not conform with the provisions of the Act of August 24, 1935, (49 Stat. 793), as amended: *Provided,* That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purposes of the contract involved or inconsistent with the provisions of this Act*: Provided further, That the Office of Federal Procurement Policy Act (Public Law 93-400, Act of August 30, 1974, 88 Stat. 796) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts.*

(b) Payments of any grants or under any contracts pursuant to section 102[,] *and* 103[, or 104] of this Act may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

[(c) Any contract requested by a tribe pursuant to section 102 and 103 of this Act shall be for a term not to exceed one year unless the appropriate Secretary determines that a longer term

would be advisable: *Provided,* That such term may not exceed three years and the amounts of such contracts shall be subject to the availability of appropriations: *Provided, further,* That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of a tribal organization.]

(c) Any self-determination contract requested by an Indian tribe pursuant to section 102 of this Act shall be for a term not to exceed three years in the case of a new contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and for an indefinite term in the case of a mature contract: Provided, That the amounts of such contracts shall be subject to the availability of appropriations: Provided further, That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of an Indian tribe or tribal organization.

(d)(1) No later than Fiscal Year 1989, the Secretary shall begin using the calendar year as the basis for contracts and agreements under this Act except for instances where the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall submit a report to the Congress within 90 days of enactment of this Act on the amounts of any additional obligational authority needed to implement this section in fiscal years 1988 and 1989.

(e) [Notwithstanding any provision of law to the contrary, the appropriate Secretary may, at the request or consent of a tribal organization, revise or amend any contract or grant made by him pursuant to section 102, 103, or 104 of this Act with such organization as necessary to carry out the purposes of this title. *Provided, however,* That whenever] *Whenever* an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective upon a date specified by the appropriate Secretary not *less than one year* [more than one hundred and twenty days] from the date of the request by the *Indian* tribe or at such [later] date as may be mutually agreed to by the [appropriate] Secretary and the *Indian* tribe.

(f) In connection with any *self-determination* contract or grant made pursuant to section 102 *or 103*[,103 or 104] of this Act, the appropriate Secretary may [—]

(1) permit a tribal organization [to utilize,] in carrying out such contract or grant, *to utilize* existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within *the Secretary's* [his] jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance[;]

(2) donate to a tribal organization the title to any personal property found to be in excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, including property and equipment purchased with funds under any self-determination contract or grant agreement; and

(3) acquire excess or surplus Government property for donation to a tribal organization if the Secretary determines the property is appropriate for use by the tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act.

(f) The contracts authorized under section 102 [and 103] of this Act and grants pursuant to section *103* [104] of this act may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: *Provided,* That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(g) Contracts and grants with tribal organizations pursuant to sections 102[,] *and* 103[,and 104] of this Act and the rules and regulations adopted by the Secretaries of the Interior and Health, Education, and Welfare pursuant to section 107 of this Act shall include provisions to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

[(h) The amount of funds provided under the terms of contracts entered into pursuant to section 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided,* That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.]

CONTRACT FUNDING AND INDIRECT COSTS

SEC. 107. (a) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act—

(1) shall include all contract costs incurred by a tribal organization in connection with the contract;

(2) shall not be reduced to make base funding available for any new self-determination contract;

(3) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(4) shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract: Provided, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract;

(5) shall not be reduced by the Secretary in subsequent years except by a reduction in Congressional appropriations from the previous Fiscal Year for the program or function to be contracted;

(6) shall not be reduced by the Secretary to pay for Federal functions, including but not limited to Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring; and

(7) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract.

(b) The Secretary shall provide an annual report in writing on or before March 15 of each year to the Congress on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and indirect costs of tribal organizations under self-determination contracts;

(2) an accounting of the actual obligations of tribal organizations for direct program costs and indirect costs for self-determination contracts for the current fiscal year;

(3) an accounting of any deficiency of funds needed to provide required indirect costs to all contractors for the current fiscal year;

(4) the indirect cost rate and type of rate for each tribal organization negotiated with the Department of the Interior Office of Inspector General;

(5) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(6) the indirect cost pool amounts and the types of costs included in the indirect cost pools;

(7) activities of the Secretary in assisting Indian tribes to establish and administer indirect cost systems;

(8) a list of requests for technical assistance made by tribal organizations made pursuant to section 104; and

(9) any findings and recommendations regarding needed improvements in the system of indirect cost funding.

(c) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, state, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization: Provided, That nothing in this section shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(d) Indian tribes and tribal organization shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A–87, incurred for fiscal years prior to fiscal year 1988.

(e) Any right of action or other remedy relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving the required annual single audit report or, for any period covered by law or regulation in force prior to enactment of the

Single Audit Act of 1984 (Public Law 98-502, Act of October 19, 1984, 98 Stat. 2327), any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 984.).

(f) The Secretary of the Interior shall not remove or alter any program or portion thereof in the Indian Priority System, or in any other system of advising a tribe of appropriations estimates or Federal projects for the benefit of the tribe pursuant to the Indian Reorganization Act (Act of June 19, 1934, 48 Stat. 987) except pursuant to an Act of the Congress. The Secretary shall publish in the Federal Register a notice of intent at least one hundred and eighty days prior to the date of seeking such authority. Such notice shall provide a statement of the impact on base funding levels for each affected Agency and tribe.

(g) Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract. Such combined amount shall be carried in the Secretary's budget at the sepcific budget location of the contracted program for as long as the contractor continuously contracts such program.

(h) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall treat those monies actually passed onto construction contractors and subcontractors as pass-through funds.

(i) Within one month after enactment of this subsection, the Secretary shall establish a team in each Area of the Bureau of Indian Affairs which consists of agency personnel and tribal representatives for the purpose of analyzing the "Indian Priority System" and other aspects of the budgeting and funding allocation process of the Bureau of Indian Affairs for the purpose of making a report to Congress with appropriate recommendations for changes and legislative actions to achieve greater tribal decision making authority over the use of funds appropriated for the benefit of the tribes and their members. The report along with the analysis, findings and recommendations of the Area teams shall be submitted to Congress within six months of the enactment of this subsection.

PROMULGATION OF RULES AND REGULATIONS

SEC. *108.* [107.] (a) The *Secretary is* [Secretaries of the Interior and of Health, Education, and Welfare are each] authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title*: Provided, however, That all federal requirements for self-determination contracts and grants under this Act*

shall be promulgated as regulations in conformance with the Administrative Procedures Act (sections 552 and 553 of title 5, United States Code).

(b)(1) Within *ninety days* [Six months] from the date of enactment of this Act *or any amendments thereof,* the Secretary *shall, with the participation of Indian tribes,* [of the Interior and the Secretary of Health, Education and Welfare shall each to the extent practicable, consult with national and regional Indian organizations to] consider and formulate appropriate rules and regulations to implement the provisions of this title.

[(2) Within seven months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education and Welfare shall each present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.]

(2) [(3)] Within *one hundred eighty days* [eight months] from the date of enactment of this Act *or any amendments thereto,* the Secretary [of the Interior and the Secretary of Health, Education, and Welfare] shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(3) [(4)] Within *two hundred forty days* [ten months] from the date of enactment of this Act *or any amendments thereto,* the Secretary [of the Interior and the Secretary of Health, Education, and Welfare] shall promulgate rules and regulations to implement the provisions of this title.

(c) The Secretary *is* [of the Interior and the Secretary of Health, Education, and Welfare are] authorized to revise and amend any rules or regulations promulgated pursuant to this section: *Provided,* That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the *Committee* [Committees] on Interior and Insular Affairs of the United States [Senate and] House of Representatives *and the Select Committee on Indian Affairs of the United States Senate* and shall, *in consultation with Indian tribes,* [to the extent practicable, consult with appropriate national or regional Indian organizations and shall] publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

REPORTS

[SEC. 100. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request through reg-

ulations promulgated consistent with the Administrative Procedures Act (sections 552 and 553 of title 5, United States Code).]

REASSUMPTION OF PROGRAMS

SEC. 109. Each contract or grant agreement entered into pursuant to sections 102, 103, and 104 of this Act shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and hearing to such tribal organizations, rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: *Provided,* That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety and, in such cases, he shall hold a hearing on such action within ten days thereof. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

CONTRACT APPEALS

SEC. 110. (a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over civil actions on claims against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an offficer of the United States or any Agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

(b) Where the Secretary proposes a revision or amendment to a self-determination contract, the Secretary may notify the contractor and the tribal governing body(s) in writing of the specific revision or amendment which is proposed, and the rationale for the proposal. All amendments proposed by the Secretary or the contractor must be agreed to, in writing, by the contractor, the tribal governing body(s) and the Secretary. If such agreement cannot be obtained, the proposed amendment shall not be adopted by the Secretary.

(c) The Equal Access to Justice Act (Public Law 96-481, Act of October 1, 1980, 94 Stat. 2325, as amended) shall apply to administrative appeals by tribal organizations regarding self-determination contracts.

(d)(1) Except as provided in paragraph (2), the Contract Disputes Act ((Public Law 95-563, Act of November 1, 1978, 92 Stat. 2383) as amended) shall apply to self-determination contracts.

(2)(A) Notwithstanding the provisions of section 8(g)(1) of the Contract Disputes Act (Public Law 95-563, Act of November 1, 1978, 92 Stat. 2383) as amended), a tribal organization may, within one hundred twenty days after receipt of a copy of a decision of an agency board of contract appeals, appeal such a decision—

(i) to a United States district court; or

(ii) to the United States Court of Claims.

(B) Notwithstanding the provisions of section 10(a) of the Contract Disputes Act ((Public Law 95-563, Act of November 1, 1978, 92 Stat. 2383) as amended) or of any contract provision, regulation, or rule of law to the contrary, and in lieu of appealing the decision of the contracting officer under section 6 of the Contract Disputes Act to an agency board, an Indian tribe or tribal organization may bring an action directly on the claim—

(i) in a United States district court; or

(ii) in the United States Court of Claims.

(e) Subsections (c) and (d) of this section shall apply to any case pending on or commended on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such cases finally disposed of before the date of enactment of these amendments, the 30-day period referred to in section 504(a)(2) of Title 5, United States Code, shall be deemed to commence on the date of enactment of this subsection.

EFFECT ON EXISTING RIGHTS

SEC. *111.* [110.] Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

TITLE II—THE INDIAN EDUCATION ASSISTANCE ACT

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TITLE III—CONSOLIDATED CONTRACT FUNDING

(a) At the request of a tribal governing body, the Secretary of the Interior is authorized, for a period of three years beginning on the date of enactment of this Act, to pay to the tribe (in a lump sum or in such installments as the tribe may request) an amount equal to at least the amount the tribe would be eligible to receive under contracts with the Secretary under section 102 of this Act for direct program costs and indirect costs, except for funds provided under the Indian School Equalization Formula (ISEF) pursuant to Title XI of

the Education Amendments of 1978 (Public Law 95-561, as amended). For the year for which and the extent to which funding is provided to a tribe pursuant to this section the tribe shall not be entitled to contract for such funds under section 102.

(b) The Secretary of the Interior shall not be obligated to provide services or benefits to a tribe or its members to the extent that funding is provided for such services or benefits pursuant to this section: Provided, That a tribe receiving funding pursuant to this section is not obligated to provide the same services and benefits as the Secretary would otherwise have provided.

(c) The tribe may contract or otherwise provide for the services or benefits to be provided by another entity, including the Secretary or other Federal Agencies and the Secretary and such other Agencies are hereby authorized to enter into contracts or agreements with the tribe for such purpose.

(d) The Secretary and each tribe receiving funding pursuant to this section shall report annually to the Congress on the relative costs and benefits of funding consolidation, including the merits of full tribal responsibility for the management of resources.

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